

**FILLING THE CONSTITUTIONAL LACUNAE
CONCERNING ISLAMIC BANKING AND FINANCE
LITIGATIONS IN NIGERIA: TOWARDS NATIONAL
HARMONY**

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ABSTRACT

The objectives of this thesis are to fill the gaps in the Nigerian constitution 1999 relating to Islamic Banking and Finance (IBF) Litigations, using the system as an inter-faith bridge in pluralist Nigeria as well as using Alternative Dispute Resolution (ADR) to supplement the limited court system. The doctrinal methodology was the main method but some interviews were conducted to support it. This research found that the Constitution fell short of, among others, not providing original Jurisdiction to the Sharia Court of Appeal on matters of IBF; rather, it vested the same on the Federal High Court and appellate jurisdictions on the Federal Court of Appeal and the Supreme Court, whose constitutional requirements for the appointment of their Benchers do not include general knowledge of the Sharia. This work also found that amendments to the constitution, enactment of separate IBF Act, ADR, emulating Malaysia and the establishment of IBF Court or Tribunal will help in filling the lacunae in the Constitution. It was also found that having IBF is within constitutional right to worship and can be used as a bridge to unite Muslims and Christians in Nigeria. The study presented three contributions to legal research on IBF; Firstly, a microscopic view was made in the constitutional problems of incompetent Benchers in IBF litigations. Secondly, proposal was made for the use of ADR, special courts and laws to handle IBF matters. Thirdly, hypothesis was made to prove that IBF is the constitutional right of both Muslims and Christians. In conclusion, it is hoped that these findings and suggestions will be used by the government to legally enhance IBF operations in Nigeria for national harmony.

ABSTRAK

Objektif kajian ini adalah untuk mengisi kekurangan yang ada di dalam perlembagaan Nigeria 1999 yang berkaitan dengan litigasi Perbankan dan Kewangan Islam (IBF), menggunakan suatu sistem sebagai penghubung antara agama di negara Nigeria yang pelbagai agama sepertimana menggunakan “Alternative Dispute Resolution” (ADR) sebagai sokongan terhadap sistem mahkamah yang agak terbatas. Metodologi utama kajian adalah doktrin perundangan dan disokong dengan kaedah temubual. Kajian ini mendapati bahawa Perlembagaan Nigeria tidak memperuntukkan Bidang kuasa asal kepada Mahkamah Rayuan Syariah dalam perkara berkaitan IBF; sebagaimana kuasa itu diberikan kepada Mahkamah Tinggi Persekutuan dan Mahkamah Agung, yang mana keperluan perlembagaan untuk melantik hakim-hakim di mahkamah itu tidak memerlukan pengetahuan tentang Syariah. Kajian ini juga mendapati bahawa pindaan Perlembagaan, pengubalan akta IBF yang berasingan, penggunaan ADR, serta penubuhan Mahkamah IBF atau Tribunal mampu mengisi Lakuna dalam Perlembagaan. Di dapati juga IBF merupakan salah satu hak beragama menurut perlembagaan yang boleh digunakan bagi menyatukan orang Islam dan Kristian di Nigeria. Kajian ini menghasikan tiga sumbangan berkaitan IBF; pertama, pandangan yang terperinci ke atas permasalahan perlembagaan terhadap hakim-hakim yang tidak kompeten dalam litigasi IBF. Kedua, cadangan dibuat untuk penggunaan ADR, mahkamah khas dan undang-undang untuk mengendalikan hal ehwal IBF. Ketiga, hipotesis dibuat untuk membuktikan bahawa IBF merupakan hak perlembagaan ke atas orang Islam dan Kristian. Kesimpulannya, diharapkan dapatan dan cadangan ini akan digunakan oleh kerajaan untuk meningkatkan operasi IBF di Nigeria secara sah demi keharmonian negara.

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DEDICATION

This work is dedicated to my late grand-parents, who brought me up, late District Head and Ballama (Borno Emirate Treasurer) of Borno, Nigeria, Alhaji Zanna Ballama Abubakar and late Hajjah Kalthum Wuromaram, as well as my beloved parents, late Mainin Kinandimi (Second to the king of Borno), Nigeria, Alhaji Muhammad Ibn Abdurrahman Mu'az Ibn Jabalin and late Hajjah 'Aishatu Bintu Abubakar Ballama. May their souls rest in *Jannah al-Firdaus* (Paradise)! Amen!

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LIST OF ABBREVIATIONS

AA	Arbitration Act
ADR	Alternative Dispute Resolution
AC	Appeal Cases
ACE	Area Courts Edict
All E R	All England Report
All NLR	All Nigeria Law Report
MR	All Malaysia Reports
AU	African Union
CA	Court of Appeal
CAN	Christian Association of Nigeria
CBN	Central Bank of Nigeria
CBNA	Central Bank of Nigeria Act
CBNSAC	Central Bank National Sharia Advisory Council
CFRN	Constitution of the Federal Republic of Nigeria
CLJ	Current Law Journal
CWN	Calcutta Weekly Notes
FBTLR	Failed Bank Tribunal Law Report
FCT	Federal Capital Territory
FHC	Federal High Court
FHCR	Federal High Court Rules
FMB	Financial Mediation Bureau
FMSLR	Federated Malay States Law Reports
FSC	Federal Supreme Court
HC	High Court

IFB	Interest Free Banking
IB	Islamic Banking
IBF	Islamic Banking and Finance
KLCMC	Kuala Lumpur Court Mediation Centre
KLRC	Kuala Lumpur Regional Centre for Arbitration
LR	Law Report
LRNN	Law Report of Northern Nigeria
MDCs	Multi-Door Courts
MLJ	Malayan Law Journal
NDICA	Nigerian Deposit Insurance Corporation Act
NJC	National Judicial Council
NJI	National Judicial Institute
NNLR	Northern Nigerian Law Report
NRNLR	Northern Region of Nigeria Law Report
NWLR	Nigerian Weekly Law Report
PBUH	Peace Be Upon Him
QB	Queen's Bench
RA	<i>Radiallah 'anhu</i> (Allah be pleased with him)
SAW	<i>Sallallahu 'alalhi wa sallam</i> (Peace be upon him)
SC	Supreme Court
SC	Supreme Court
SCA	Sharia Court of Appeal
SCIA	Supreme Council of Islamic Affairs
SCNJ	Supreme Court of Nigeria Judgments
Sh.LRN	Shariah Law Report of Nigeria

SWT	<i>Subhanahu wa Ta'ala</i> (Glorified is His name in His Highness)
TLR	Times Law Report
UN	United Nations
USD	United States Dollars
WRN	Weekly Report of Nigeria

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Adnan Omar and Bank Islam Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd [2005] 5 AMR 381

Affin Bank Berhad v. Zulkifli Abdullah [2006] 1 CLJ 438

African Continental Bank PLC v Losada (NIG) LTD (1995) 7 NWLR 26

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Bowman v Secular Society (1917) A C 406

Bradford v. Huntington, 30 U.S. 402, 432 (1831)

Credit Corporation (Malaysia) Bhd v K. M. Basheer Ahmad & Anor [1985] 1 MLJ 208

Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd [1996] 4 MLJ 295

Fewehinmi v NBA (1989) 2 NWLR (PT 107) 558

Godwin Sunday Ogboji v Governor of Central Bank Nigeria & Ors (2011) [Case File Number: Fhc/Abj/Cs/710/2011] (unreported).

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[1998] 4 MLJ 623

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Lawal v Ejidike (1997) 2 NWLR 319

Lawal v Younan (1961) 1 All NLR 245

Lee Bude v Torrington Railway (1871) L.R. 6 C.P

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Lex Mercatoria v. Regional Unification of Law', Uniform Law Review (2001), 45

Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 2 Malayan Law Journal 53

Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Anor [1992] 2 MLJ 244

Malayan Banking Bhd v Ya'kup bin Oje [2007] 6 MLJ 389

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Bank and Other Financial Institutions Act 1991, Nigeria.

Borno State Rent Tribunal Law 2000, Nigeria.

Carriage of Goods by Air (Colonies Protectorates and Trust Territories) Order, 1953, England.

Central Bank National Sharia Advisory Council (CBNSAC) Act 1997 of Nigeria

Central Bank Act 2003

Central Bank of Malaysia (Amendment) Act 2003 (Act A1213)

Child's Right Act 2003, Nigeria.

Civil Law Act (Malaysia) 1956

Colonial Laws Validity Act 1865, England.

Constitution of the Federal Republic of Nigeria, 1999

Federal Constitution of Malaysia 2000

Federal Republic of Nigeria (FRN), Standing Order of the House of Representatives, 2007

Guideline on Skim Perbankan Tanpa Faedah (Interest-Free Scheme), 1993, Malaysia.

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Halsbury Laws of England 4th ed. Vo.16 paragraph 1629

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CHAPTER 1: INTRODUCTION

1.1 Background

1.1.1 Nigeria

Nigerian citizens¹ existed independently and as unrelated entities before the arrival of the British colonialists.² The nature of the administrations varied; some communities operated under organized leadership while some were not well organized though they equally have chains of leadership.³ The Kanem-Borno Empire⁴ and Sokoto Caliphate,⁵ in the Northern region, have had chains of organized formal and rigid systems of administration. Their systems of administration were mostly hereditary and assisted by lieutenants who acted for and on behalf of those Muslim leaders.⁶ They operated the Shari'ah legal system. Historically, as far back as the 11th century, it was practised in many parts of today's Nigeria like Iwo, Ikirun, Ede, Ilorin, Kano, Borno, Katsina and Etsako Division Auchi and

¹ Nigeria is the richest West African nation with the largest concentration of black people in the world. Over 50% of its 170 million populations are Muslims with 40% Christians and 5% atheists. It is nicknamed as the giant of Africa. Sampson I. T. (2014). Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State–Religion Relations and its Implications for National Security. *Oxford Journal of Law and Religion* Volume 3, Issue 2, 311-339; Muhammad, L. A., & Atte O. A. (2006). An Analysis of Agricultural Production in Nigeria *African Journal of General Agriculture African Studies on Population and Health* Vol. 2, No. 1; Okolo C. B. (1994). *Squander Mania Mentality: Reflections on Nigerian Culture*, Nsukka: University Trust Publishers, 1; Abdullahi, S. I. (2013). Islamic Banking in West African Sub-Region: A Survey *Arabian Journal of Business and Management Review (OMAN Chapter)* Vol. 2, No.7; The Economist Magazine (2015), *Nigeria's Moment* June 20th, 2015, 11.

² Falola T., & Heaton M. (2008). *A History of Nigeria*. Cambridge, Cambridge University Press.

³ Tobi, N., (1996) *Sources of Nigerian Law*. Lagos: M.J. Professional Publishers Ltd: 1.

⁴ Collins R. O. (2005). *Kanem: Decline and Merger with Borno (c. 1400)*. Encyclopedia of African History, ed. Kevin Shillington New York: Fitzroy Dearborn.

⁵ Last M. (1967). *The Sokoto Caliphate*. Longmans, Green and Co, London

⁶ Like the *Mainin Kinandi* (second to the king in all arms of Kanem-Borno Government), *Waziri* (Prime Minister), *Shettima* (Scholar/Head of Unit) etc. El-Yakub, K. (2009). *An Auto-Ethnographical Study of Integration of Kanuri Traditional Health Practices into the Borno State Health Care System*. Ph.D. Thesis, Durham University, 52; Naniya, T. M. (2000). Arab Settlers in Sub-Saharan Africa: A Survey of their Influence on Some Central Sudanese States. *A Journal of Savanna & Sudanic Research*, vol. 1 no.1

Okpella of Edo State. In the period between 1804 and 1900, it was practiced in those parts either as the law of the state or applied by some communities within the regions.⁷

Islam came to Nigeria through the Kanuri people of Kanem-Borno Empire and consequently, the Shari'ah (Islamic Law). It is believed that Arab merchants brought Islam to Borno. Mai Humme Jilme (1085 – 1097 C. E.) was the first Mai (king) of Borno to embrace Islam⁸ resulting in the spread of Islam into the whole of the Kingdom.⁹ Though the Hausa land embraced Islam around 1797,¹⁰ traditional religion was mixed with the practice of Islam. Shehu Usman Dan Fodio (1754 – 1817) wedged a *jihad* (holy war) against the Hausa rulers and established Islamic law throughout his kingdom.¹¹

In a similar vein, Western part of Nigeria is predominantly the Yoruba speaking ethnic group. Just like their counterparts in the Northern part of the country, the Yoruba people have a leadership structure under the leader called the *Oba*. It had mainly a patriarchal outlook. Customs and traditions were respected and put to practice in the administration of government and judiciary.¹² It is believed that Islam reached Yoruba land close to the 18th Century. Though Shari'ah was not implemented, Muslims practice their religion with less or no challenges.¹³ Some learned Islamic scholars came to Yoruba land by 1830 through *Ilorin* (a Yoruba city in Northern Nigeria).¹⁴ Muslims constitute the majority population in Yoruba land up to this date.¹⁵ Christian missionary activities arrived in the

⁷ Abdullah, U. Y. (1998). *Sharia in Africa*, Ijebu-Ode: Shebiotimo publication, 83-84.

⁸ Meek, C. K. (1971). *The Northern Tribes of Nigeria*. London: Frank Cass. Vol. 2, 262.

⁹ Naniya, T.M. (2000). *Op. Cit.* 6.

¹⁰ Balogun, A. B. (1975). *The Life and Works of Uthmān dan Fodio; the Muslim Reformer of West Africa*. Islamic Publications Bureau. Lagos, Nigeria, 98.

¹¹ Naniya, *Op. Cit.*

¹² Tobi, N. (1996), *Op. Cit.*, 1.

¹³ Fafunwa, A.B. (1979). *History of Education in Nigeria*. UK: George Allen and Unwin Ltd., 57.

¹⁴ *Ibid.* Like Ahmad Qifu and Uthman bin Abubakar who came to Ilorin during the reign of Oluyedun and established large Islamic schools.

¹⁵ *Ibid.* Idol worship is still found in most parts of the South Western part of the country. Unfortunately Muslims also participate or combine idol worship with Islam for example the worship of Osun deity.

South Western part of Nigeria in the 18th Century. Their activities in the region have significantly resulted in setting back the pace of the spread of Islam.

Islam reached the South Eastern part of the country lately following the jihad of Sheikh Usman Dan Fodio.¹⁶

The British colonialists amalgamated the Northern and Southern Protectorates of Nigeria in 1914 and named it Nigeria. Islamic law was fully implemented in both Kanem Borno and Sokoto empires by then. They gradually stopped the implementation of Islamic Criminal law by subjecting it to validity tests. In fact, the Native Court Ordinance explicitly mentioned that Islamic Law is the same as customary law. The implication of this provision is that before Islamic law applies, it must not be repugnant to natural justice, equity and good conscience just like the customary law. Finally, the Penal Code was passed into law which has some Islamic flavour and that expressly put an end to the regime of the application of Islamic criminal law in Nigeria. However, Islamic law of personal status continued to apply.¹⁷In other words:

“With western and European colonization of Muslim lands, the practice of Islamic Shari’ahh is in many areas reduced to family matters.”¹⁸

Nigeria became an independent country on the 1st of October, 1960 and became a republic in 1963. Nigeria is Africa’s most populous country with 170 million people. This population comprises of over 500 ethnic groups.¹⁹ Though, there are divergent views as to

¹⁶ Shehu Usman Danfodio a Fulani by tribe is the leader of the Sokoto Caliphate. He led the Sokoto jihad on the Hausa emirs of Northern Nigeria and succeeded in establishing an Islamic state in most part of Northern Nigeria. Akínládé, K. (1979). Shehu Usman dan Fodio. Ibadan: Onibonoje Publishers.

¹⁷ Tobi, Op. Cit., 42.

¹⁸ Buang, A. H. (2007). Islamic Contracts in a Secular Court Setting: Lessons from Malaysia. *Arab Law Quarterly* 21, 317-340, 318.

¹⁹ Hausa Fulani has the lion share with 29%, Yoruba 21%, Igbo 18%, Ijaws 10%, Kanuri 4%, Ibibio 3.5%, Tiv 2.5% see Miles, J., (2009) *Customary Islamic Law and its Development in Africa*. UK: African Development Bank, ND, 105.

the percentage of Muslims in Nigeria, it is generally believed that Muslims make up 50 percent of Nigeria, Christians 40 percent and 10 percent traditional religion. Nigeria's Muslim population is estimated at 78,056,000 which make up 5 percent of the world's Muslim population.²⁰

1.1.2 Religion and the Nigerian Constitution:

The Nigeria Constitution does not recognize any religion as the religion of the state. In fact the Constitution states that:

“The Government of the Federation or of a state shall not adopt any religion as state Religion.”²¹

Though the Constitution does not recognize any religion, it has however, guaranteed the right of every Nigerian to practice the religion of his choice.²² Similarly, part of the fundamental right provision on freedom of thought is the permission of religious instructions in schools and religious ceremonies.²³ The Constitution provides for the establishment of Shari'ah Court of Appeal with civil jurisdiction to determine matters of Islamic personal law.²⁴ These facts are pointers to the fact that Muslims in Nigeria have the right to practice their religion which extends to IBF because the conventional banking system violates Islamic principles hence the need for an alternative for Muslims as approved by their religion, *Islam*. However, the fact remains that not all rights are clearly

²⁰ Grim, M., Brian, M., & Becky, H., (2011). Estimating the Global Muslim Population. *Interdisciplinary Journal of Research on Religion*. 7(2), 15.

²¹ Section 10, 1999 Constitution Federal Republic of Nigeria (CFRN)

²² Ibid, Section 38(2).

²³ Ostien, P. & Dekker, A. (2010). *Sharia and National Law in Nigeria*. Quorted from *Sharia and National Law: Comparing the Legal Systems of Twelve Islamic Countries*. Otto J. M. editor. Egypt: Leiden University Press, 585.

²⁴ Section 275 CFRN 1999.

specified in the constitution; the right to IBF is implied in the right to freedom of religion²⁵ and the right to freedom of peaceful association.²⁶

The basis of the prohibitions in IBF transactions is the avoidance of self-harms and harm to others physically, through harmful products, or economically through, *inter alia*, gambling, usury and cheating. The Quran provides:

“...do not kill (destroy or harm) yourselves...” (Q. Nisa’i 4:29).

This verse made a blanket prohibition of everything that causes harm or destruction to both humans and its society and hence the illegality of transactions based on usury, cheating and exploitation such as conventional bank and financial institutional loans.

Islam is a complete way of life that demands Muslims to ensure that all aspects of their life are governed by the Shari’ah. In business transactions, believers must ensure that they only engage in lawful businesses and must avoid anything that has elements of usury. The Qur’an states:

“Those who devour usury will not stand except as stand one whom the Evil one by his touch hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (forever).”²⁷ (Quran, Baqarah 2:275).

²⁵ Section 38 CFRN 1999

²⁶ Ibid, Section 40.

²⁷ Qur’an, Baqarah 2:275.

The above verse clearly states that usury is not the same with trade and the verse below clarified what usury means, that doubling or multiplying the original loan sum when paying back.

The Qur'an clarifies:

“O ye who believe! Devour not usury, doubled and multiplied; but fear Allah that ye may (really) prosper.” (Qur'an, Ali Imran 3:130).

The questions arise, what if the loan repayment does not amount to doubling or multiplying the original loan? What if the loan currency suffers devaluation before the time of repayment? Allah answers these questions in the following verse that demands fear of Allah and thus avoiding cheating and injustice.

Allah commands:

“O ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers. If ye do it not, take notice of war from Allah and His Messenger. But if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly.” (Qur'an, Baqarah- 2:278-279).

All these verses are pointers to the fact that Islam totally condemns all acts of illegality relating to business or trading. It is a fact that contemporary banking and finance deals with *riba* and partakes in business activities that are contrary to Islamic law. These factors, among others, therefore make it necessary for Muslims to look for an alternative to the

Conventional banking and finance system. However, Muslims should not prohibit transactions to which the Quran is silent. It is therefore lawful to do such things.²⁸

Cheating is one of the prohibitions in IBF and seems to be the basis of most prohibitions in Islamic commerce. When a man confessed to the Prophet [S.A.W.] that he used to cheat in his business transactions, the Prophet then directed that there should be no treachery or cheating in your business transactions.²⁹ A notorious example of cheating is found in the *Jahiliyya* (pre-Islamic) usury which is the main element of abhorrence in IBF.³⁰

This Islamic stand is reflection of the prohibition of usury in the scriptures before Islam. The following verse makes the provisions in the Quran as an embodiment of the Bible and the Torah:

“It is He Who sent down to thee (step by step), in truth, the Book confirming what went before it; and He sent down the Torah (Of Moses) and the Gospel (of Jesus)”
(Quran Ali Imran 3:3).

The above verse is being put to use by non-Muslim nations such as Britain thus making Islamic Banking and Finance a global vogue. This can be appreciated from the opinion of the British Prime Minister, David Cameron, who said, in the World Islamic Economic Forum held in London in November, 2013:

²⁸ Buang, A. H. (2014). Op. Cit., 160.

²⁹ Malek, I. (2008). *Al-Muwatta Imam Malek*. Vol. 2, Hadith 1393, .202 Rendered to English by Matraji, F. A. Dar El-Fikr Beirut.

³⁰ Al-Asqalani, A., & As-Sanani, M. I. (1996). *Bulug Al Maram*, Hadith 648, Dar-us-Salam Publication, Riyadh.

"I don't just want London to be a great capital of Islamic finance in the Western world; I want London to stand alongside Dubai and Kuala Lumpur as one of the great capitals of Islamic finance anywhere in the world."³¹

Similarly, non-Muslim countries like New Zealand, Singapore and England have embraced IBF by allowing Muslims to develop the promising system.³² In fact in Islamic States like Malaysia, the need to refocus attention on the improvement of Islamic principles in all business affairs has been re-echoed by scholars.³³

Nigeria like most nations of the world rose up to the occasion by putting in place the non-interest banking and finance system. This has long started in Egypt as the first African nation to introduce the system.³⁴

From the foregoing, it is clear that IBF is part of worship in both Islam and Christianity. Its operations are therefore constitutional and do not amount to creating any state religion. The question of whether the present day Bible is authentic or not is not within the scope of this thesis.

1.1.3 Legal History of IBF in Nigeria:

The Central Bank of Nigeria is the body mandated by law to issue license for the operation of all banking services in Nigeria. The promulgation of Central Bank of Nigeria (CBN) Act 2007 and the Banks and Other Financial Institutions Act (BOFIA) was indeed a landmark development in the effort to confer some measure of autonomy on the CBN to

³¹ Reuters (2014). Britain aims to be first Western country to issue sovereign Islamic bond <http://uk.reuters.com/article/2013/10/29/uk-britain-finance-islamic-idUKBRE99S00I20131029> Retrieved September 2, 2015

³² Buang, A.H. (2002). Islam and Muslims in New Zealand, *Jurnal Usuluddin*, vol. 16, 155.

³³ Buang, A.H. (2008). Appreciation of Shari'ah Principles in Property Management in Contemporary Malaysian Society. *Jurnal Syariah*, vol. 16, 555.

³⁴ Gelbard, E., Hussain, M., Maino, R., Mu, Y., & Yehoue, E. B. (2014). Islamic Finance in Sub-Saharan Africa: Status and Prospects. *International Monetary Fund Working Paper, August, 2014, 3*.

effectively carry out its core mandate. But the financial system continued to witness rapid reforms and developments which challenged the legal framework of the CBN. Significant of such developments are the transfer of the supervision of specialized banks to the CBN, global war on economic crimes, unprecedented bank failures associated with weak internal controls, reform of banking industry and the entire economy, adoption of Universal Banking in Nigeria.³⁵ These developments made a complete review of the existing legal framework necessary. New measures were proposed for strengthening the CBN which became embodied in the CBN Act of 2007.³⁶

The Central Bank of Nigeria Act, 2007 signaled a new era of economic reforms in Nigeria. It gave more autonomy to the CBN in carrying out its financial regulatory functions according to international best practices. One of such functions is the supervision and regulation of the non interest banks (NIB) in Nigeria. It is noteworthy that the provisions in the CBN Act 2007 and the BOFIA have laid a legal foundation for non interest banking in Nigeria. It is in pursuance of this that the Bank issued certain guidelines pursuant to some relevant provisions in the CBN Act 2007 and the BOFIA.

The CBN Act 2007 provides:

“In addition to any of its powers under this Act, the Bank may... issue guidelines to any person and institution under its supervision.³⁷

In this bid, the CBN issued a draft framework for the regulation and supervision of non-interest banks in Nigeria on March 4th, 2009.³⁸ This was in response to the increasing

³⁵ CBN (Central Bank of Nigeria) (2011). Legal Services Department.

³⁶ Dauda, M. (2013). Legal Framework for Islamic Banking and Finance in Nigeria, *Journal of Islamic and Middle Eastern Law (EJIMEL)*. Vol 1(7), 161.

³⁷ Section 33(1) (b) of the CBN Act 2007.

³⁸ CBN Op Cit.

number of investors as well as banks and other financial institutions desiring to offer Non-interest products and services.³⁹

Despite the provision under the CBN Act 2007 and BOFIA on the creation of non-interest banking in Nigeria, the aspect of litigation relating to IBF has not been fully covered by the laws in Nigeria just as in other countries such as Malaysia and Indonesia.⁴⁰ The previous researches did not dig into the numerous provisions of the constitution requiring amendments towards the smooth and proper adjudication of IBF matters in the Nigerian Courts. These lacunae left very serious issues unresolved and pose future legal clogs in the wheel of the smooth running of IBF in the country. Justice must not only be done but it must be seen clearly to be done; there could be no justice in the situation where the constitution itself is full of paucity. This is in view of the fact that disputes and litigations cannot be avoided in all cases relating to the subject. This thesis therefore examined this difficult constitutional scenario and suggested ways out of it. The issue of the powers of the governor of CBN to issue IBF licenses, as challenged in the unreported case of Godwin Sunday vs. CBN Governor and others, was as well, briefly discussed as it is not the main theme of this study.⁴¹

IBF in Nigeria came at a time when a greater percentage of Muslims in Nigeria are clamoring for the establishment of banking and finance system that is free from *riba* and other forms of business transactions that are unacceptable under Islamic law. This effort by Nigerian Muslims could be as a result of what Buang, A. H. described as Muslims' efforts to avoid social decay by being indifferent to IBF by themselves.⁴²

³⁹ Dauda, M., Op. Cit. 164.

⁴⁰ Buang, A. H. (2007). Op. Cit., 330; *Affin Bank Berhad v. Zulkifli Abdullah* [2006] 1 CLJ 438.

⁴¹ Godwin Sunday Ogboji V Governor of Central Bank of Nigeria & others. *Federal High Court, Abuja. Case number 710/2011 (Fhc/Abj/Cs/710/2011)*.

⁴² Buang, A. H. (2007). Op. Cit. 317.

The Central Bank of Nigeria issued the license for the take-off of Islamic banking in accordance with the Central Bank of Nigeria Act and the BOFIA. Though the non-interest banking and finance has fully started and has been receiving patronage from both Muslims and non-Muslims in Nigeria,⁴³ the issue of litigation and a specific legislation with respect to the system is not well addressed.⁴⁴ This therefore informs the bases for the formulation of the following hypothesis which will later form the research questions for this thesis:

First, the laws, especially the grand norm, the constitution, in Nigeria have not adequately covered the issue of litigation with respect to IBF in Nigeria. Since it relates to issues of Islamic business transactions, the Shari'ah courts are supposed to be the appropriate courts with jurisdiction to preside over matters relating to Islamic law since they are well grounded on the matters. The CBN governor's role should be clearly spelt out in a specific law for IBF just as obtained in the Malaysian Islamic Financial Act, 2013.

Second, since very serious and threatening gaps exist in the Nigerian constitution on IBF litigations, while efforts are being put to fill those gaps, Alternative Dispute Resolution (ADR) should be encouraged so that disputes are not even allowed to get to the stage of litigation. It minimizes cost and delay in justice delivery; it is said, justice delayed is justice denied.

Third, the mistrust between Muslims and Christians in Nigeria has largely contributed to the schism concerning whether or not operating IBF is not aimed at Islamizing Nigeria as alleged by some Christians. Orisankoko said:

“Ethical, faith-based and Shari'ah banking are amongst the series of fairly high-sounding nomenclatures most Nigerians have christened Islamic

⁴³ Abdullahi, S. I. (2013). Op. Cit., 1.

⁴⁴ Bello, A. & Abubakar, M. (2014). Challenges and Solutions to Islamic Banking System in a Pluralistic–Secular Country like Nigeria *Mediterranean Journal of Social Sciences (MCSEER)*. Vol 5 No 6, 1.

banking. This is another challenge that is currently facing the Muslims and some good numbers of believing non-Muslims.”⁴⁵

The thesis will discuss the use of provisions of the two main scriptures to show that IBF is the constitutional right for both Muslims and Christians thus uniting them for their common good. The acceptance of the system in non-Muslim jurisdictions worldwide is also discussed to assist in convincing non-Muslims to embrace the system. The 60% of shareholders (not 60% of Nigerian non-Muslims) in the only fully fledged IB, The Jaiz Bank, in Nigeria are Christians of the Igbo tribe.⁴⁶ This is encouraging as it serves as a pointer to the fact that IBF can be used as a bridge for national unity, peace and prosperity and hence the need to enhance the legal framework of this important system.

The provisions of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 which form the nucleus of this thesis, regarding the gaps therein, were discussed in Chapter three. The implication of religious laws as the basic source of IBF was also discussed in Chapter four. The fifth chapter was devoted to Alternative Dispute Resolution (ADR), *Sulh* and *Tahkim*, as supplement to the limited or defective constitutional provisions on IBF litigations. This is viewed as another means of filling the lacunae.

1.2 Statement of Problem

IBF in Nigeria is a child of necessity in view of the fact that Muslims in Nigeria need an economic system that is interest free and compliant with Islamic principles. Nigeria operates conventional banking and finance system which practice usury and other *haram* (impermissible) businesses. A legal dearth exists on the specific statutory provisions for

⁴⁵Orisankoko, A. S. (2012). Socio-Economic and Legal Challenges of Shari’ah-Compliant Banking Operation, its Developmental Impacts and the Struggles of the Believers: Epistemological Lessons from Nigeria. *Journal of Islamic Economics, Banking and Finance*. Vol. 8 46 No. 2, 45.

⁴⁶ Sanusi L.S., (2011). Islamic Finance in Nigeria: Issues and Challenges, a *lecture delivered at Markfield Institute of Higher Education, UK*. June 17, 2011

the manner of settling disputes relating to the system as well as qualified judges in the field. The implication of these *lacunae* is injustice and confusion which militates against the smooth operation of the IBF system in the country. This is because dispute in banking and finance transactions are inevitable in view of its complex nature. If a clear legal framework is obtained, the tension between Muslims and Christians on the constitutionality of the system will be reduced, the dispute could be vertical disputes (between banks) which are only decided by the FHC or horizontal which are between banks and customers and can be decided by all other High Courts except the Shari'ah Courts. Filling those legal gaps form the corner stone of this research.

1.3 Objectives

The objectives of this research are:

1.3.1 To identify and fill the research gaps, regarding the litigations of IBF matters, in the 1999 Nigerian Constitution

1.3.2 To analyse the Muslim-Christian debate over the constitutionality of IBF operations in Nigeria through the concurring and tallying provisions relevant to the subject in the Scriptures, through reference to IBF operations in non-Muslim nations and through proving that IBF is a constitutional right to worship for both faiths in Nigeria

1.3.3 To study Alternative Dispute Resolution (ADR) as an augmentation to the limited IBF adjudication legal framework in Nigeria

1.4 The Research Questions

1.4.1 What are the gaps in the CFRN 1999, relating to IBF in Nigeria, and how best could they get filled?

1.4.2 To what extent can the concurring scriptural provisions on IBF, constitutional right to worship and the global acceptance of IBF, be used to calm the debate and

disharmony between Muslims and Christians, on the implementation of IBF in Nigeria for national harmony?

1.4.3 How best can ADR supplement IBF litigations in Nigeria before and after the amendments to the limited constitution and enactment of a separate IBF Act?

1.5 Research Methodology

Looking at the nature of the research which involves the examination of the gaps in the Nigerian constitutional provisions concerning litigations on IBF, the doctrinal methodology was used to arrive at positive findings and contribute to the existing few literature on it. It is also called documentary analyses.

This statutory law based research used the doctrinal method in the analysis of the laws on non-interest banking and finance in Nigeria, the lacunae in the laws and the scriptural view point. In doing so, both primary and secondary sources of data were used. These include the Nigerian Constitution, the CBN Act, BOFIA, the Qur'an, the hadith, the Bible, textbooks, journals, judicial authorities, theses. Articles from newspapers and magazines were also used to supplement the data. Others are computer aided electronic research (internet) such as Westlaw International, LexisNexis, Lexis Malaysia, LawNet, Index Islamicus, HeinOnline, CLJ Law and Jetp. It is obvious that most of the search tools used were specifically law tools while some of the tools are general search tools used in other disciplines.

In order to add to the originality of the work, without being a qualitative or quantitative research, empirical methodology was as well adopted to support the main doctrinal methodology used in this research. The empirical approach involved fieldwork where some interviews, directly and by proxy (using voice recorder), were conducted with a banking and finance expert (Babayo Saidu), a community leader (Bunu Monguno), *Ulama* (Muslim scholar) (Sheikh Muhammad Salis Alfa), a Nigerian Christian elite (Christian

Chibueze Madu and Mr Abayomi) and lawyers (DR Umar Alkali, Dr. Abdul Aziz Obayemi). Among them was a Bank manager who was directly involved in the business of non-interest banking in Nigeria (Babayo Saidu). The legal challenges facing the IBF system in Nigeria, especially at its teething stage, will be better appreciated from such a person.

In order to know the view of the community, an interview was conducted with a community leader. The community leader represents the people and therefore his feelings about the non-interest finance speak more of what the people in his community think. He represented all the people in his community and as such spoke for both the Muslims and the non-Muslims.

Similarly, the history of the evolution of the system in Nigeria was traced through the same methodology to lay a proper foundation for the subsequent discussions in the thesis.

1.6 Scope and Limitations of the Study

As the research title suggests, the circumscription or framework of this study bordered on law and legal related aspects of IBF in Nigeria with some references to the Malaysian Laws and some elements of the subject in other jurisdictions such as the Middle East, Asia and the Western world. Conventional Banks with Islamic Windows were also mentioned. Case and Statutory Laws (both spiritual and temporal) formed the spinal code of the research.

In specific terms, this study focuses on the analysis of the gaps in the Nigerian Constitution as it relates to the subject. The Muslim Christian debate on Islamic banking is also a focal point of this discussion. Analyses were made to find ways of harmonising the situation by bringing IBF under the right to worship guaranteed by section 38 of the Nigerian constitution for both religions.

Alternative Dispute Resolution is a very important aspect of settling dispute in addition to that of the courts especially considering the lapses in the constitution in that respect. ADR, therefore, form a very important aspect of the research as it presents a peaceful and amicable way of settling IBF disputes. It also saves harmonious relationships, time and money.

However, discussing and analyzing ADR, *per se*, is not within the scope of this research because it is only brought in here to serve as an intereme solution before the gaps in the constitution are filled through amendments. That was why it is not specifically mentioned in the title of this thesis. The three aspects of this research (filling the constitutional gaps on IBF, harmonizing Muslims and Christians on IBF and ADR as a complement for the defective constitutional provisions on IBF litigation in Nigeria) are therefore interwoven and cogent. This is towards achieving the desired harmony in the Boko Haram affected nation where each of the adherents of the two religions are shifting the blame of the insurgency on the other. More discussions on this matter are coming up at Chapter four.

It is reemphasized here that the main methodology used for this thesis is the doctrinal method and interviews were only, optionally, conducted to support the main method.

With respect to the limitation of the research, due to the current insecurity in Northern Nigeria caused by the *Boko Haram* terrorism,⁴⁷ the researcher's ability to reach out to many people for interviews was a serious challenge as people are afraid of visitors especially those from the North Eastern part of Nigeria which is the worst affected area. A State of Emergency was declared in some states due to the rampant cases of unlawful

⁴⁷ Boko Haram, meaning, Western education is unlawful, is an insurgent group claiming to fight for Islamic rule in Nigeria but, ironically, killing more Muslims than non-Muslims. Onuoha, F. (2014). *Boko Haram and the evolving Salafi Jihadist threat in Nigeria*. Pérouse de Montclos, Marc-Antoine. Leiden: African Studies Centre. 158–191.

detentions, torture, extra judicial killings. Hence the researcher's ability to go round became very difficult for the fear of his safety especially lawyers are often the victims of such wrong doing.

1.7 Chapters

Chapter 1: Introduction:

This chapter introduces the thesis and its forthcoming chapters. Objectives, significance, research questions, methodology and the flow of the chapters are stated in this chapter.

Chapter 2: Literature Review

Here, a critical review of relevant literature in relation to the objectives and research questions were made. Any literature lifted here for discussion at the discussion chapters become data. The gaps in the subject of research will be pinpointed here through the previous works in the field.

This chapter also pinpoints the legal infrastructure or framework of IBF in Nigeria and their gaps with reference to Jaiz Bank case and other matters. The spiritual sources of IBF laws are specifically discussed in chapter five.

Chapter 3: Constitutional Lacunae:

This chapter narrowed the discussion to the particular problem of constitutional lapses which poses potential threat to the smooth running of the IBF system especially with regard to litigations and the Shari'ah academic handicap of the High Court Judges who are vested with the exclusive jurisdiction to decide matters relating to the subject.

Chapter 4: Harmonising Muslims and Christians through Concurring Scriptural laws and the Global Acceptance of IBF:

As stated above, this chapter discusses the provisions of the Qur'an, the Bible and the Old Testament (Torah) relating to IBF. It is geared towards achieving one of the objectives of the thesis; the building of bridge of peace, unity and prosperity between the Muslims and the Christians in Nigeria through the concurring inter-faith laws on the subject. This will enhance the success of the IBF system in the country.

Chapter 5: ADR as part of Solution to the Constitutional Lacunae:

This discussion proffers solution to the constitutional lapse through ADR, at least, before the rigorous and time consuming constitutional amendments.

Chapter 6: Conclusion:

This last chapter rounds up the thesis with a summary of the discussions as contained in the preceding chapters. The findings, academic contributions and suggestions of this practical thesis also form part of this chapter.

1.8 Chapter Conclusion

This introductory chapter as its name suggests, introduced the headings and sub-heads discussed in the forthcoming body and conclusion of the thesis. It literally prefaced the entire thesis. It provided an overview of the thesis by stating the research background, problems, objectives, research questions, methodology, significance, limitations and scope of the research. These items are interconnected and concurrent with one another. They serve as prelude and, therefore, mind setter to the reader on what to expect in the thesis.

The thesis is in six chapters; First is the Introduction (which includes the methodology); Second is the Literature Review; Third to fifth are the Discussions and findings and finally, the sixth is the conclusion (which includes summary of the findings).

CHAPTER 2: LITERATURE REVIEW

2.1 Chapter Introduction

Islamic Banking and Finance⁴⁸ is one of the ways of business transactions that is in accordance with Islamic principles. The reality of modern times which makes the use of banks indispensable in business necessitated the need for a form of banking that is in line with Islamic principles. The system in Nigeria has long been agitated for by the vast majority of the Muslim population in Nigeria. Due to lack of appropriate legal framework and the political will to see to its establishment, Nigerian Muslims stayed for decades without IBF institutions. The fact that the conventional banking (CB) system operates or deals with *Riba* and other unIslamic systems of business, such as transactions involving wine and gambling, the need for the system therefore became exceedingly necessary.

Several literatures have examined the field. Some centered on its promising prospect and the challenges facing it while some looked at its position in the Nigerian Concept. This work varies from all the other literatures by going beyond the operation and challenges of the IBF institution in Nigeria by making a microscopic view of the lacunae in the Nigerian Constitution pertaining to litigations on the subject. It also looked at the use of ADR as a worthy alternative towards cushioning the effect of this constitutional short coming while effort is being made towards addressing this defect through new legislations and amendments. The research also showed that the right to worship under section 38 of the Nigerian constitution also relates to IBF as it affects the dos and don'ts of both Islam and Christianity. Unlike this broad research, previous literatures only looked at this right in the perspective of Muslims and Islam only. This research further postulates the use of IBF as a bridge for Muslim-Christian interfaith harmony and economic partnership which could

⁴⁸ Hassan, M. K., Kayed, R. N., & Oeri, U. A. (2013). *Introduction to Islamic Banking and Finance: Principles and Practice* Pearson Education Limited Edinburgh Gate Harlow Essex CM20 2JE England, 2.

ensue, the much desired, unity and prosperity in Nigeria. It also attempted to proffer solution to the problem of the vagueness of the powers of the CBN governor to issue license to Jaiz Bank as challenged at an Abuja High Court.⁴⁹

The researcher throws in his voice after presenting the debating views of other writers under the various sub-heads in this chapter.

2.2 History of Islam and IBF in Nigeria

According to Naniya, T.M. (2000), Islam came to Nigeria through the Kanuri people of Kanem-Borno Empire. He said that Arab merchants brought Islam to Borno and that Mai Humme Jilme (1085 – 1097 C. E.) was the first Mai (king) of Borno to embrace Islam. He further narrated that the king's conversion resulted in the spread of Islam into the whole of the Kingdom.

Abdallah, B. F. (1975) said that though the Hausa land embraced Islam around 1797, traditional religion was mixed with the practice of Islam. He clarified that Shehu Usman Dan Fodio (1754 – 1817) wedged a *jihad* (holy war) against the Hausa rulers and established Islamic law throughout his kingdom.⁵⁰

The cumulative effect of the above two histories reveals the fact that although Islam first came to the Nigerian area through the Kanuri people, over 600 years before the birth of Dan Fodio, the Sultan of Sokoto, from the Hausa- Fulani tribe, hold the position of the chairmanship of the Nigerian National Council of Islamic Affairs. The Shehu of Borno, the Kanuri king and leader of the first Muslim community, deputises for the Sultan. Perhaps that is due to the greater population of the Hausa-Fulanis over the Kanuris.

⁴⁹ *Godwin Sunday Ogboji v Governor of Central Bank Nigeria & Ors* (2011) Supra (Op. Cit.)

⁵⁰ Naniya, op cit.

Falola T. & Heaton M. (2008) narrated that Nigerians existed in separate and independent Kingdoms before the amalgamation in 1914.

Tobi, N. (1996) further clarified that just like their counterparts in the Northern part of the country, the Yoruba people have a leadership structure under the *Oba*. It had mainly a patriarchal outlook. Customs and traditions were respected and put to practice in the administration of government and judiciary.

Fafunwa, A. B. (1979) stated that Islam reached Yoruba land close to the 18th Century. He said though Shari'ah was not implemented, Muslims practice their religion with less or no challenges.

Abdullah, U. Y. (1998) elaborated that historically, as far back as 11th century, Islamic law was practiced in many parts of today's Nigeria like Iwo, Ikirun, Ede, Ilorin, Kano, Borno, Katsina and Etsako Division Auchi and Okpella of Edo State. He said, in the period between 1804 and 1900, it was practiced in those parts either as the law of the state or applied by some communities within the regions.

Abikan, A. I. (2009) tracing the history of loaning in Northern Nigeria said that in the pre-colonial Sokoto caliphate of Nigeria, which presently consists of more than half of the present day Northern Nigeria, various forms of money lending were present in 1903.

The foregoing literature reveal that since IBF, as the name suggest, is a product of Islam which has been practiced since the 9th Century in the area now called Nigeria, the recent codifications about it are mere continuations or modernisations.

Abikan, A. I. (2009), discussing the evolution of modern IBF in Nigeria added that in 1952, the first Banking Ordinance was promulgated which saw the result of protest by nationalist that the banking industry is dominated by foreigners. The Central Bank of Nigeria Ordinance and Banking Act of 1958 also saw the light of the day. The Central

Bank of Nigeria Decree No. 24 of 1991 and the Bank and other Financial Institution Decree No. 25 were enacted in 1991. He opined that the thrust of these laws was to control the new banks and other financial institutions emerging as a result of the 1987 financial liberalization and deregulation.

Orisankoko, A.S. (2012) observed that usually, most indigenous authors, academia and scholars have continuously reviewed the historical background of Islamic, or Non-Interest, Banking in Nigeria, majority seem to center their focus on the defunct Habib Nigeria Bank Ltd as the first Islamic variant-banking model to have opened a window for Non-Interest banking while Jaiz International PLC is regarded the nip-board of the full-fledged Islamic Bank in Nigeria. Al-Baraka Micro Finance is taken for the pioneer Islamic Micro-finance while Lotus Capital Investment Limited is regarded as the primal Islamic Finance and investment institution in Nigeria.

While Abikan traced the legal history of conventional Banking, Orisankoko focused on the IBF legal aspect which is the main subject of this research.

This research contributes to the strengthening of the legal pillar of IBF in Nigeria to enhance its speedy and unshaken development. This was done through its constitutional blessing, inter-faith harmony and ADR as would be discussed later in chapters 3, 4 and 5.

2.3 The Concept of IBF

Although the scope of this work does not include the whole concept of IBF but its litigation aspects as contained in the constitution, yet it is relevant to briefly discuss it as a clarification for the main theme. Its challenges includes the constitutional lacunae which is the backbone of this thesis as discussed in chapter 3.

Imam et al (2010) explained that Islamic law by definition and concept is the natural order established by Allah for mankind to achieve balance, justice and equity not only for men but also for all things created by Allah material and non-material. It is a whole system that does not give room for selective appreciation of nature.

Muhammad, A. (2003) submitted that Shari'ah,⁵¹ as a comprehensive system of divine law⁵² which regulates the entire life of a human being,⁵³ demands that Muslims⁵⁴ must accept the Shari'ah into all their affairs.

Allah thus directs:

“We have made for you a law (Shari'ah) so follow it and not the fancies of those who have no knowledge.” (Qur'an 45:18).

The principle of Islamic economy, being part and parcel of the organic Islamic principles, requires Muslims to accept and practice same, the Glorious Qur'an says:

“O you who believe, Eat not your property amongst yourselves unjustly except it is by trade amongst you, by mutual consent.” (Qur'an, Nisa 4:29).

The Qur'an guides:

“O you who believe (Muslims), when the call is proclaimed for Friday juma'at prayers, come to the remembrance of Allah, (juma'at religious talk

⁵¹ Qur'an, Al Jathiyah 45:18 “We then appointed you to establish the correct laws (Shari'a)...” Linguistically, the word “Sharia” means “a way to the watering place.” Juristically, it means the legal system of Islam. *Ansariyan Publications - Qum* Islam: Faith, Practice & History

⁵² Abdul al Ati, H. (1977). *The Family Structure in Islam*. American Trust Publication, USA, 1-5

⁵³ Qutb, S. (1972). *In the Shade of the Qur'an*, Vol. 30, Salahi, M.A., and Shamis A.A., (Translators) (WAMY, Egypt, 1972) pxiii.

⁵⁴ Including non-Muslims as they are also called to embrace Islam: “This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion...” Qur'an, Maidah: 5:3.

(khutba) and salat (prayer), leave off business (and every other thing), that is better for you if you did know. Then, when the Juma'at salat (prayer) is ended you may disperse through the land and seek the bounty of Allah (by working etc), and remember Allah much; that you may be successful” (Qur'an Al-An'am 6:9-10).

The above injunctions of the Qur'anic clearly point out the need for Muslims to ensure they strive to earn from that which Allah has made lawful and to avoid that which is unlawful and hence, the consiration of IBF as the constitutional right of the Nigerian Muslims. It is also the right of the Christians as could be seen in the discussions in chapter four.

Bambale, Y. Y. (2007) reiterates that Muslims must make sure that they only engage in trades and professions that are lawful in the eyes of the Shari'ah and avoid that which Allah disallows. But unfortunately, nowadays people do not care the kind of work they do so long as they get money as to them success is all about getting money.

Islamic law of banking and finance is primarily rooted in clean business whereby neither party suffers cheating. Allah ordains:

“Do not deal with others unjustly and you should not be dealt with unjustly” (Qur'an, Al Baqara 2:279).

The Prophet (PBUH) said:

“...do not cheat and don't be cheated...”⁵⁵

The glorious Qur'an warns believers to stay away from harming/cheating others. The act of eating the wealth of another through *riba* amounts to cheating and a wrong doing which

⁵⁵ Hanbal A. I. (1993). *Musnad Imam Ahmad ibn Hanbal*, Bayrut: Dar Ihya' al-Turath al-'Arabi, vol. 5, Hadith no 2865.

Allah has prohibited in several verses of the Qur'an.⁵⁶ *Riba* under Islamic Law is seen as an act of cheating on the poor, hence, it must be avoided and condemned.

The Glorious Qur'an warns:

“Those who eat *Riba* (usury) will not stand (on the day of Resurrection) except like the standing of a person beaten by Satan leading him to insanity. That is because they say: Trading is only like *Riba*, whereas Allah has permitted trading and forbidden *Riba*. So whosoever receives the admonition from his Lord and stops eating *Riba* shall not be punished for the past.” (Qur'an, Al-Baqarah 2: 275).

In yet another verse, Allah directs:

“Oh you who belief, Eat not up your property among yourselves unjustly except it is by trade amongst you, by mutual consent...” (Qur'an, Nisa 4: 29)

Jabir reported that the Prophet (PBUH) curses the devourer of usury, its payer, its scribe and its two witnesses. And the Prophet (PBUH) said they are equal in sin.⁵⁷ In the words of Al-Qardawi Islam forbids illegal earning in all respect, Islam legalizes earning the correct way and forbids all forms of earning that come through wicked ways.⁵⁸

Gafai, I. A. (2010) explained that the aim of Shari'ah is to use truth in arriving at justice through the progressive use of the rules and principles of adjudication.

⁵⁶ See Qur'an, Ali-Imran: 57 &140; Qur'an, Al-Shu'ara: 40.

⁵⁷ Bukhari, M. I. I. (1979). *Sahih al Bukhari* vol. 7, hadith 166. Translated by Khan, M. M. Chicago: Kazi Publications. See also Kathir I. (2000). *Al Misbahul-Munir Fi Tahdheeb, Tafsir Ibn Kathi* Riyadh: Darussalam Publishers and Distributors, 2000, P435.

⁵⁸ Qardawi, Y. (2009) *Wealth and Economy in Islam* Cairo: Islamic Inc., nd, 15.

Khaf, M. (1996) said IBF calls for the redistribution of resources and stands against oppression and all forms of illegalities.

Madupe A.N. *et al* (2012) argued that Shari'ah is therefore more of a code of religious duties in every aspect of private and public field which guaranteed its authority and the unity of Muslims despite their great diversity.

Azahari, F (2009) opined that the main approaches in the definition of *riba* may be broadly categorised into liberal, mainstream and conservative. *Riba* is generally translated into English as usury or interest but in fact *riba* has a much broader meaning in Islamic law. *Riba* literally means increase, addition, expansion or growth. However, in economic context it is generally considered as a contractual increase on loaned money or commodity. A sale and purchase transaction, on the other hand, is not an agreement for a contractual increase but is a contract of exchange of goods for an agreed selling price. The subject matter of the loan contract is the increase itself represented by a monetary value whilst in a sale and purchase transaction there are goods being traded at an agreed price. The objective in each transaction differ in that in the former, the creditor aims to obtain profit from the increase above the principal amount and in the latter, is to obtain goods and earn profit.

Abikan, I (2009) observed that IBF transactions are either contracts of exchange or gratuitous contracts or trust based contracts. Thus, we find contracts such as sales, partnership, lease or tenancy, mortgage, agency, assignment and reconciliation falling under *al-mu'amalat*. Contracts of *waqf* (endowment), loan, *hibah* (gift), guarantee and testament are categorized under *al-tabāru'āt*. And contracts like cost price sale, less-cost sale and deposit are classified under *al-amānāt*, amongst others.

According to Aziz, M. R. (2013) the IBF system can be described as a system of banking or banking and finance activity that is consistent with the principles of the Shari'ah as

governed by the law of Allah, the most high. In this current global economic environment of extraordinary challenges and uncertainties, it is becoming very much a part of the journey to bring the world towards a new level of stability, prosperity and international integration.

Shakeel, A. (2015) observed that the basis of IBF is that it denounces usury, termed as *riba* in Arabic (which is the lending of money on interest). Furthermore, the concept holds that money has no intrinsic value it is only a measure of value, and since money has no value itself, there should be no charge for its use. Therefore, Islamic Finance is said to be asset based as opposed to currency based whereby an investment is structured on exchange or ownership of assets and not money; The Islamic Financial System is based on elements of Shari'ah which governs Islamic societies.

Zetani, L. (2015) added the system is based on interpretations from the Qur'an. Its two central tenets of interest-free loans and socially responsible investment make it an imputable panacea to the current global economic crises. The key difference, from a financial perspective, is the non-interest rule since the Islamic socially responsible investing paradigm is not much different from what other religions do.

It can be added for clarity that Zetani should have added the Hadith, being one of the two primary sources of the Sharia'ah, as a second basis of the system. The Qur'an attests to that thus: "Whoever obeys the Prophet surely obeys me."(Qur'an, Nisa, 4:80).

Since IBF do not indulge in interest and other *haram* activities, they must think and work towards getting alternative lawful incomes. To that extent, Haron and Azmi (2005) opined that since IB is an alternative to conventional banking, they need to be innovative in terms of products and services. It is only through innovation in products and services can they sustain their competitive advantage against other conventional banks that offer similar Shari'ah compliant facilities.

Smith, F. M. (1979) revealed that the charging of usury on loans is one of the earliest professions. Although both Islam and Christianity have prohibited it, poverty leads some borrowers to accept loans on interest. That is why the prophet said that poverty can lead to *kufir* (disbelieve (and therefore crime)).⁵⁹ He also prayed:

"O Allah, I seek refuge in Thee from poverty, lack and abasement, and I seek refuge in Thee lest I cause or suffer wrong."⁶⁰

Siddiqi (2006) opined that generally Muslims think that *riba* (which they generally and correctly thought included bank interest) makes the banking and financial system unfair and incapable of ensuring the best interests of people.

Abu Zaid, A. M. (1996) revealed that a notorious example of cheating is found in the *Jahiliyya* (pre-Islamic) usury which is the main element of abhorrence in IBF.

These factors, among others, therefore make it necessary for Muslims to look for an alternative to the Conventional banking and finance system.

Buang, A. H. (2014) however, enjoined Muslims not to prohibit transactions to which the Quran is silent. It is therefore lawful to do such things.

Buang's observation is of enormous importance to the speedy growth and global acceptance of the system because of the obvious modern finance techniques day to day introduces. When Islam came in the *Jahiliyya* period, before Islam, it did not abrogate all the customs. It amended some and accepted some in toto.

⁵⁹ Bukhari, vol. 7, Hadith 840.

⁶⁰ Sunan Abu Dawud Hadith 1539

After all, according to Abikan A. I. (2009) the various forms of transactions undertaken by conventional banks fall under one or the other types of economic transactions broadly classified under the Islamic law.

Lawal, Y. O. (2012) observed that IB is not synonymous to non interest banking. Prohibition of interest is just a part. Islamic banking is ethical banking which abhors interest, investment in gambling, consumption or transactions in alcohol, pornography, all economic activities that are socially or morally injurious to the society. All its invested funds are tied to tangible assets (asset backed). The funds are therefore involved in productive activities.

Chikezie, E. P. (2014) narrated that interest free loans were practiced pre-Islam among Jews and Christians, and later advocated by socialists and economists. The Old Testament, in Deuteronomy, teaches interest free loans to the poor and the Judeo-Christian thought views loans with interest as doing little for economic brotherhood. The Old Testament was the key influence on Jewish and Christian opposition to interest, and may have been the original reason for the Qur'an's dismissal of usury since the three religions share the same belief in the God of Abraham. Apart from religion, socialists condemned interest as encouraging a parasitical existence.

2.4 Benefits of IBF

Ajagbe, T. S. and Brimah, A. N. (2013) opined that IBF in Nigeria is full of great opportunities as it works on a market for profit and loss sharing. Interestingly interest free bank or finance is of numerous advantages to start with, it results in efficient allocation of investible funds. Islamic banking system can offer alternatives at the micro finance level. The social benefits are obvious since the poor are often exploited by tender charging usurious rates.

Bambale, Y.Y. (2007) suggested that IBF deserves acceptance from both Muslims and non-Muslims not just because it is in consonance with Islamic economic system and Biblical provisions, but also because it comes along with huge benefits that will serve as antidote to the current global economic meltdown. Islamic law permits and encourages Muslims to partake in lawful commercial transactions

According to Muhammad (2015), the flexible nature of IBF provides enormous opportunities; it has positive and far-reaching impact for the economy. This is because the interest-free principle in Islam allows only one kind of loan which is referred to as *qard-el-hassan* (good loan). Under this principle, the lender does not charge any interest or additional amount over the money lent. In conventional terms, it means Banks and other financial institutions cannot charge interest on loan or stipulate a certain amount to be paid back together with the loan given. Similarly, the profits or losses arising out of the enterprise for which the money was lent should be shared. The principle of Islamic finance is the encouragement of wealth redistribution; customers are therefore encouraged to invest their money and to become partners in order to share profits and risks in the business instead of becoming creditors.

Muhammad, S. S., (2015), said this position is opposed to the interest-based commercial banking system, where all the pressure is on the borrower: he must pay back his loan, with the agreed interest, regardless of the success or failure of his venture.

Paino, H. (2011) opined that, in Malaysia, Islamic Banks have offered considerable service to the society in discharge of their Corporate Social Responsibilities (CSR).

Errico and Farahbaksh (1998) added that Islamic banking or financing is concerned with the provision of factors of production as well as goods and services without acquiring an immediate counterpart to be paid by the receiver. This is because it follows the rules of

Shari'ah called *Fiqh Muamalat* (Islamic Rules on transactions) which is derived from the Qur'an, Sunnah and other secondary sources of *Shari'ah* such as *Ijma* and *Qiyas*.

Based on this, Khaf, M. (1996) relates that Islamic bank operates in accordance with the principles of Islam. It calls for the redistribution of resources and stands against oppression and all forms of illegalities.

Obiyo, O. C. (2008) stated that the Islamic ban on interest does not mean that capital in an Islamic system is costless. Rather, Islamic finance recognises capital as a factor of production but it does not allow the factor to make a prior or predetermined claim on the productive surplus in the form of interest. This obviously poses the question as to what will then replace the interest rate mechanism in an Islamic framework. There have been suggestions that profit-sharing can be a viable alternative. It is believed that the financing on the profit and loss sharing system of Islamic banking in a conducive environment would not only ensure a healthier financing portfolio and of course, higher rates of return to depositors but would also lead to optimum allocation of resources for overall economic growth and welfare of the society individually and collectively.

These literatures, being sourced from the followers of different religions, testify to the benefits of the system across nations and religious creeds.

Siddiqi, N. (2006) opined that generally Muslims think that *riba* (which they generally and correctly thought included bank interest) makes the banking and financial system unfair and incapable of ensuring the best interests of people. Islamic economists, as well as Muslim scholars in general, did their best in trying to establish this point in the third quarter of the last century and onwards. The same period witnessed two developments that many perceive to be in opposite directions. Firstly, the world, especially the advanced industrial countries, enjoyed phenomenal growth in wealth and, to a great extent, in welfare too. Banking and finance are rightly seen to be a contributing factor. Secondly,

dissatisfaction with the conventional system continued to grow as many saw it as one of the causes of increasing inequality in the distribution of income and wealth within nations as well as between nations of the world.

According to Andrews (2009), based on Islamic principles, Islamic Finance offers its clients Shari'ah compliant banking but the real meaning, and to be fair, the true benefits of this, are often lost on Western observers, some of whom have tended to dismiss the sector as yet another example of fundamentalist religious doctrine applied to real life. But this cynical view is not only undeserved it is also mostly inaccurate. In reality, even a cursory study of Islamic Finance and its guiding principles will confirm that it is indeed probably the most successful model for ethical banking to date. He further argued that despite the promising outlook of the Islamic banking, it is not without its challenges which stakeholders in the industry must be ready to face and address so that the banking can fit and survive in the contemporary ever competing and challenging environment.

Haque, A. (2013) opined that IBF possesses a sound capability to attract customers by offering integrated value added services. Undoubtedly, they seem to be very useful for obtaining account information, and also, they use modern looking equipment

Rahimi and Zakaria (2013) further assert that IBs are unique or different from their conventional counterparts in terms of their underlying modus operandi. Guarded with the belief that interest or *riba* is totally unacceptable, Islamic banks operation is based on Shari'ah compliance principles such as profit sharing basis, real asset transactions and strict adherence to the rule of no speculative elements. With these differences on the three basic principles, Islamic banks portray different response during the recent financial meltdown.

According to Bahari, Z. B. (2019) IB is one of the components in Islamic financial sector that plays very vital role to generate the growth of economic, beside Islamic capital market,

takaful (Islamic insurance) and mutual fund. It could be as alternative fund sources to non-Muslim and as imperative to all Muslims who are engaged in the economic activities. Importantly, the emergence of Islamic banking had eliminated the roles of *riba*, *maisir* (gambling) and *gharar* (uncertainty) which were implemented by conventional banking system. On the other hand, Islamic banks can generate on *halal* activities, promoting profit and loss sharing and quest for justice, ethical and sanctity contract.

Thambiah, S. *et al* (2010) opined that IBF is no longer regarded as a business entity striving to fulfill only the religious obligations of the Muslim community, but more significantly as a business that ought to be as competitive as conventional banking. This necessitates Islamic financial institutions to really understand the needs of their customers towards Islamic banking services.

Grewal B. K. (2010) opined that Islamic finance, which is fast becoming a unique and integral part of the global financial system, will inevitably be impacted by the changing global landscape of financial regulation, due to internationalization and continued growth of Islamic finance. The global call for improved regulation and increased oversight will thus intensify the efforts that have already been undertaken to strengthen the financial regulation of Islamic finance.

IB is supposed to be for both Muslims and non-Muslims. In appreciation of that, Juwairiah opined that Muslims mostly patronize Islamic banking windows.⁶¹ Kahf added that a view at the operation and output of Islamic banking is enough to reveal that it is not meant for Muslims only.⁶²

⁶¹ Juwairiah, M., A. (2011). *Study on the Customer's Acceptance towards Islamic Banking Product among Non-Muslim in Dual Banking System*. Masters Degree Thesis, Universiti Utara Malaysia, 2011, 58.

⁶² Kahf, M., (2002). *Strategic Trend in the Islamic Banking and Finance Moment*. Paper Presented at Harvard Forum on Islamic Finance and Banking, Harvard University, Cambridge, Boston.

Mokhtar M. S. A. *et al* (2006) added that IB though, initially, created to serve the needs of the Muslims for an alternative banking system that is free of riba and other forms of islamically prohibited dealings, has now grown to serve people of all beliefs. Islamic banking is now a viable banking system that is globally accepted and respected.

Sanusi, L. S. (2011) held the same view for Nigeria.

The Holy Quran confirms what was already revealed to the Jews and Christians. (Quran Ali Imran 3:3). Therefore IBF is also meant for the benefit of the whole of humanity including, of course, the people of other scriptures as could be seen in the Biblical⁶³ and Torah provisions.⁶⁴

Kettell, B. B. (2010) observed that the ongoing turbulence in the global financial markets has drawn attention to an alternative system of financial intermediation; Islamic banking and finance. This is now one of the fastest growing sectors within the market place and has, so far, remained on the sidelines of this unrest. Since the inception of Islamic banking thirty years ago, the number and reach of Islamic financial institutions worldwide has risen significantly. Institutions offering Islamic financial services constitute a significant and growing share of the financial system in several countries, and market participants everywhere are joining the race to study and be a part of this emerging financial system.

Garas, S. N., (2004) states that the Islamic Financial Institutions (IFIs) have witnessed a significant growth recently and have become new players in the banking and finance industries. As IFIs move towards the international markets, they confront several challenges on internal and external levels. Internally, IFIs still have limited recognition by investors, marginal contribution to the micro economy and limited customer service. Externally, IFIs have lack of communication with other players in the financial markets.

⁶³ New American Standard Bible Exodus 22:25.

⁶⁴ Dennis, L. (1933). The Squirrel Cage of Debt. *Saturday Review Of Literature* 661, June 24, 1933.

Their products are not totally promoted to the international investors and their system is not completely regulated and recognized by central banks.

Iqba Z. and Mirokhor A., (2006) observed that Islamic financial markets have made remarkable progress during the last two decades and this burgeoning growth has increased the appetite for financiers and bankers to understand more of this emerging market. IBF is principally predicated on financial transactions based on principles allowed by the Shari'ah. The founder of the Maliki School of Islamic Jurisprudence which is the official Shari'ah School of thought in Nigeria, devoted three Books to banking and finance related topics in his famous collection of Hadith Al-Muwatta.

Undoubtedly, even non-Muslim nations have appreciated the benefits that accrue as a result of adoption of the Islamic banking system.

According to Hobeika, S. (2011) in Europe, London quickly seized the opportunity to make inroads into the Islamic finance market, demonstrated by the number of Shari'ah-compliant assets under management and the number of institutions (more than twenty, of which at least seven are completely Islamic). Paris has also recently shown a firm interest in competing with the City on this market. The Jouini-Pastré report to Paris Euro place estimates the potential influx of investments into France at EUR 100 billion, mostly from the Middle East and Southeast Asia. There are also six million Muslims living in France, the largest Muslim community in Europe, who could contribute investments. This report also notes two types of products to be developed, namely property loans and remunerated bank deposits. Société Générale AM already offers its Reunion Island customers two investment funds in line with Islamic principles.

Buang, A. H. (2007) stated that the Malaysian National Steering Committee set up by the Government of Malaysia to study the possibility of introducing Islamic banking noted that from the standpoint of the need to instill confidence in the Muslim public, and for the

activities of the Islamic bank to conform to Islamic teachings, it would be useful to have a Religious Supervisory Council whose members would be religious scholars in the country.

2.5 Legal Framework of IBF in Nigeria

BOFIA 1999, Section 39 (1) (a) requires the written consent of the Governor of the Central Bank the use of the following terms by prospective banks when applying for registration or incorporation: "...Central, Federal, Federation, National, Nigeria, Reserve, State, Christian, Islamic, Muslim, Qur'anic or Biblical..."

However, according to Sanusi, L. S. (2011), IB falls under the category of "specialized bank" recognized by the BOFIA 1991.⁶⁵ This will cushion the effect of the supremacy conflict especially as the Act further states that the Governor of the Central Bank of Nigeria can further exempt the profit and loss sharing bank from any of the provisions of the BOFIA as he thinks appropriate.⁶⁶

After all, the Shari'ah is one of the sources of law in Nigeria as distinguished from customary law.

Osborn CJ (1908) described custom, in *Lewis V Bankole*, in the following words:

"...indeed, one of the most striking features of West African native custom to my mind is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individualistic characteristics."⁶⁷

⁶⁵ Sanusi, L. S. (2011). Islamic Finance in Nigeria: Issues and Challenges. *lecture delivered at Markfield Institute of Higher Education (Mihe)*, Leicester, UK, June 17, 2011., 6-7

⁶⁶ Section 52 Banks and other Financial Institutions Act (BOFIA) 1991.

⁶⁷ (1908) 1NLR 81.

As Sharia'ah is the root of IBF, It is pertinent to refer to the Quranic provision below.

Allah instructs:

“We have made for you a law (Shari'ah) so follow it and not the fancies of those who have no knowledge.” (Qur'an 45:18).

This verse signals the supremacy of the Quran over all other laws governing IBF in Nigeria. Unfortunately, the constitution provides that if any other law is in conflict with the provisions of the Constitution, that other law shall be void to the extent of the inconsistency.

Lord Sumner (1917) further compounded the situation in *Bowman v Secular Society* when he said:

“Ours is and always has been a Christian state. The English family is built on Christian ideas, and if the national religion is not Christianity there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles with equal justice and equally good government, in heathen communities and its sections even in courts of conscience...”

Detailed discussions are made in chapters three and five on the litigational aspects of IBF, which form part of its legal framework.

2.6 The Lacunae in the CFRN 1999

According to the Nigerian Constitution, the Shari'ah Court of Appeal has unlimited jurisdiction in all matters relating to Islamic personal law. Matters relating to Islamic personal law include marriage contracted in accordance with the principles of the Shari'ah, divorce and guardianship of children. Others include *waqaf* (charity or endowment) made

by a Muslim or a Muslim organizations,⁶⁸ succession or will where deceased or testator is a Muslim. This is in addition to any other additional jurisdiction that could be added to the Shari'ah Court of Appeal by the state House of Assembly.⁶⁹ It is important to mention that any additional jurisdiction conferred on the Shari'ah Court of Appeal must not be in conflict with the provision of the constitution, for example, a Shari'ah Court of Appeal cannot be vested with jurisdiction to entertain matters affecting JBF or election petition because the Constitution has conferred the exclusive jurisdiction on those matters on the Election Petition Tribunals.⁷⁰ According to the Constitution, as stated earlier, any law that is in conflict with the Constitution shall be void to the extent of its inconsistency.⁷¹

Akande, J. O. (2000), commenting on the jurisdiction of the Shari'ah court of Appeal, mentioned that the constitution has restricted its jurisdiction to only matters of Islamic personal law. These are matters of marriage, divorce and inheritance. Similarly, the jurisdiction of the court is restricted to Muslims. That means the Shari'ah Court of Appeal does not have jurisdiction over non-Muslims except where the parties consent to the jurisdiction of the court.

Going by the constitutional provision, it is certain that the Shari'ah Court of Appeal lacks the jurisdiction over matters of IBF as it is not part of Islamic personal law hence creating a serious gap and challenge with respect to issues of litigation in such cases.

Buang, A. H. (2007) regretted that with Western and European colonization of Muslim lands, the practice of Islamic Shari'ah is in many areas reduced to family matters.

⁶⁸ It must not have been registered under the Land Use Act, 1978 because any land that is registered under it will be under the exclusive jurisdiction of the High Court.

⁶⁹ Section 277 CFRN

⁷⁰ Ibid, Section 285.

⁷¹ Ibid. Section 1(3).

Buang, A. H. (2007) further lamented that IBF litigations in Malaysia are decided by Federal High Court judges and Federal Justices who are not experts on matters of Islamic commercial law.⁷² This is the same in Nigeria and hence this research to contribute in filling such lacunae which is tantamount to violating Muslim's constitutional right to worship.

According to Mowoe (2003), respecting constitutional rights is an international obligation on Nigerians and the Nigerian government, and that the rights that pertain to Nigerians are not limited to those contained in the constitution but also the African Charter on Human Rights,⁷³ and other international human right instruments.⁷⁴

Saiyidna Ali reported:

“The Messenger of Allah sent me to Yemen as a Judge. I said: O Messenger of Allah! You are sending me while I am young in years and I have no knowledge of judgeship. He said: verily Allah will soon give guidance to your heart and make your tongue firm. When two persons come to you for decision, don't give decree in favour of the first till you hear the argument of the other, because that is more necessary that decision may become clear to you. He said: I had afterwards never entertained any doubt in decisions”.⁷⁵

⁷² Buang, A. H. (2007) *Op. Cit.*, 318.

⁷³ Article 8 provides for the freedom of conscience: “The profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.” See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Chapter A9 (Chapter 10 LFN 1990) (No 2 of 1983) Laws of the Federation of Nigeria 1990.

⁷⁴ See for instance United Nations' Declarations on Religious Intolerance 1981, Article 1 (1) which has the same provision with Section 38(1) of the Nigerian Constitution.

⁷⁵ Imam Ahmad, hadith no. 1214

The above Hadith is similar to the common law doctrine of *Audi alteram partem* (hear the other side). The appointment of Ali, despite his confession as to his inexperience, does not guarantee the appropriateness of the determining of IBF matters by Judges not trained in the Shari'ah, which is the major lacunae in the constitution. This is because Ali did not say he was ignorant of the Shari'ah but merely admitted his being a newly appointed judge with little experience on the new job. The latter part of the Hadith has buttressed my point.

Bello, A. and Abubakar, M. (2014) are of the view that though the non-interest banking and finance has fully started and has been receiving patronage from both Muslims and non-Muslims in Nigeria, the issue of litigation and a specific legislation with respect to the system is not well addressed.

Abdullah S. I. (2013) also shared the above view

Yaacob, H (2014) followed suit as he emphasized that there is the need for a *Lex mercatoria* (special legislation for commerce) regarding IBF to streamline its operation *vis-à-vis* the modernization and globalization of the system.

Justice Kolawale (2011) struck out a suit seeking, *inter alia*, the withdrawal of the licence of Jaiz Islamic Bank for lack of *Locus Standi* (the right to sue). However, he said that the Attorney General of the Federation should take steps to remedy the situation, and further ensure that the CBN carries out its duties within the provisions of the law establishing it. The struck out prayer was based on unconstitutionality of the bank as it discriminates against non-Muslims and was aimed at creating a state religion. The constitution provides that no state shall practice the dictates of any religion to such an extent as to declare such religion as a state religion.⁷⁶ It also provides that no citizen of Nigeria shall be

⁷⁶ Section 10 of CFRN.

discriminated on the basis of ethnic group, place of origin, sex, religion and political opinion.⁷⁷ This will be discussed in the next chapter.

Oba, V. C. (2012) said **that** the declaration of an Abuja Federal High Court that the operation of IB in Nigeria is unlawful and inconsistent with the provisions of the Central Bank of Nigeria (CBN) Act and Banks and other Financial Institutions Act has provoked heated reactions and concerns from various quarters in Nigeria. The presiding Justice held that the Central bank (CBN) has no power to designate Islamic bank as specialized bank and that the guidelines on Islamic banking license issued by the CBN had no statutory basis which its legality could be substantiated.

The Malaysian situation is similar to Nigeria:

Buang, A. H. (2005) opined on Fatwa (Authoritative Scholarly Decision) made by the Shari'ah Consultative Council (SCC) and the National Sharia Advisory Council (NSAC) in Malaysia, which is the equivalent of the Experts Advisory Council (EAC), in Nigeria. He asserted that in as much as the professional advice of this council, to the Bank or the financial institution, is being used to determine the compliance or compatibility status of proposed products, it has become a mini-legislature. This will also be discussed in chapter three to see if it has conflict with section 4 of the Nigerian constitution which vests legislative powers on the legislature only.

Buang, A. H. (2007) further opined that a major legal challenge facing IBF in Malaysia (just as in Nigeria) springs from the paucity of man power in the judiciary to handle IBF litigations and the limited jurisdiction of the Shari'ah Court of Appeal to try cases related to it.

⁷⁷ Ibid. Section 42(1).

Ali, MD. Y. (2011) has stated that there is no consensus among Muslim scholars as to whether a woman is qualified to be a judge or not. Some opined that if she has all the requirements, there is no harm in a woman becoming a judge since no authority has prohibited that. Accordingly, and as the best person in the sight of Allah is the best in piety, there should be no issue of Muslim right violation if a female judge preside over IBF matters.

Considering the 1999 Nigerian constitution as a book, and therefore a statutory literature in a research based on it, it is pertinent to mention here that various provisions of the CFRN will be discussed in the next chapter. That was towards filling the gaps therein.

2.7 The Concurring Provisions of the Qur'an, the Bible and Torah as Tools for National Harmony through IBF in Nigeria: IBF Acceptance in Other Nations

Allah prohibited usury:

“Those who devour usury will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury.”(Qur'an, al-Baqara 2:275).

Adnan, M. Z. (2015) explained that Christians believe that the Bible is a combination of the Torah, revealed to Moses, and the Gospel revealed to Jesus.

The Bible provides:

"If you lend money to My people, to the poor among you, you are not to act as a creditor to him; you shall not charge him interest".⁷⁸

The Old Testament:

⁷⁸ New American Standard Bible Exodus 22:25.

"classes the usurer with the shedder of blood, the defiler of his neighbor's wife, the oppressor of the poor, the spoiler by violence, the violator of the pledge, the idolater, and pronounces the woe upon them, that they who commit these iniquities shall surely die."⁷⁹

Dennis, L (1933) stated that it comes as news to most people to learn that practically all important ethical teachers, Moses, Aristotle, Jesus, Mohammed, and Saint Thomas Aquinas, for instance, have denounced lending at interest as usury and as morally wrong."

Ezekiel additionally categorized usurer with the meanest and lowest of men and the vilest of criminals.⁸⁰

Alkali, A. U. (2014) stated that according to the Muslims, usury and gambling, which are elements of the conventional banking and finance system, are unlawful under the Shari'ah; they are, therefore, obliged to stay away from them.

Alkali, M. B. and Buang, A. H. (2015) summarised the whole topic when they said that God's Laws, as contained in the Scriptures, form the nucleus of society. They are therefore a veritable social mechanism for enhancing Christian-Muslim partnership. This is especially true in economic relationships, such as Banking and Finance in the pluralist society of Nigeria; as Islamic Banking and Finance (IBF) is now accepted in non-Muslim nations worldwide.

The foregoing literatures demonstrated the concurrence between the two main scriptures in Nigeria on IBF

Alkali, A. U. (2014) explained that though the name is IBF, its products and services remain open to people of all religions and indeed participation in its operations.

⁷⁹ Old Testament 2

⁸⁰ Ezekiel 18.

Chikezie, E.P (2014) observed that when IBF came up in Nigeria, the Christian Association of Nigeria (C.A.N.) was quick to unleash its rejection and displeasure over the moves.

Ibrahim, J. (1991) explained that CAN is the umbrella body for all Christian Churches with distinct identities, recognisable Church structures and a system of worship. However, the Catholics have temporarily backed out of the Association due to internal conflict in the group.⁸¹This shows how difficult to convince some Christians to accept a system originating from outside their religion since they are having discrepancies from within.

Chikezie, E.P (2014) revealed that the unequivocal denouncement of IBF by C.A.N. was based on the premise that the introduction of IB is an attempt to Islamize Nigeria.

Alkali, M. B., and Buang, A. H. (2015) lamented that the inability of many Nigerians to separate religion or politics from the economy has led to heated debate on the desirability of the bank. The ongoing controversy motivated this study to examine non-interest banking regardless of religious coloration and recommend the way it can serve as an agent of economic transformation; in a nation with 17% unemployment and an absolute poverty rate of about 70%.

Buang, A. H. (2002) explained that the non-Muslim countries like New Zealand, Singapore and England have embraced IBF by allowing Muslims to develop the promising system.

Ostien P., and Dekker, A. (2010) assert that part of the fundamental right provision on freedom of thought is the permission of religious instructions in schools and religious ceremonies.

⁸¹ Catholic Bishops of Nigeria (2013). Why We Pulled Out of CAN. *Premium Times News Paper* of 24th January, 2013.

Allah has provided for Muslims and Christians to live and transact harmoniously in a pluralist nation like Nigeria. Allah explains:

"...and nearest among them in love to the believers will you find those who say, 'We are Christians,' because amongst these are men devoted to learning and men who have renounced the world, and they are not arrogant." ⁸²

The Prophet (S.A.W.) had also made statements towards religious harmony. He said:

"I am the closest of people to the son of Mary. The Prophets are brothers from different mothers, and there is no Prophet between him and me." ⁸³

Sanusi, L. S. (2011) reiterated that undoubtedly I.B. is based on a religious law; it is indeed not a religious product or service that is exclusively meant for a people of a particular creed. It is universally accessible to and enjoyed by people of diverse religious persuasions or ethical beliefs across the globe.

Christofi, H., (2009) said Middle Eastern Islamic banks have also set up their branches in the UK (where the Nigerian Christians got their religion).

Shakespeare, W (1995) ⁸⁴ had revealed how usury and exploitation were abhorred in the British culture and religion.

Bos, W. (2007) confessed that he wanted to encourage IBF; in the first place because it meets a demand from the Muslims living in the Netherlands. In the second place because he saw an opportunity for the Dutch financial sector; a third reason is that banning system from the perspective of fighting terrorism will have a counter-productive effect. Denial of

⁸² Qur'an, al-Maidah 5:82

⁸³ Sahih Muslim, Book 30, Hadith 5834.

⁸⁴ Shakespeare, W (1995). *The Merchant of Venice*. Dover Thrift Editions.

an actual need can lead to money-flows running via alternative channels out of the sight of the government.

The literatures for the proof of IBF, as a source for bridging the rift between different religious followers, are abound and convincing. If legally enhanced, it would surely work for the much craved national harmony in Nigeria and, indeed, the world (a mere blue dot in only one of the numerous galaxies).

Alao, D.O and Esther M, (2012) contributed that the inability of many Nigerians to separate religion or politics from economy has led to heated debate on the desirability of IB. The ongoing controversy motivated this study to examine Non-interest banking system regardless of religious coloration and recommend the way it can serve as agent of economic transformation in a nation with 17% unemployment ratio and absolute poverty rate of about 70%.

Olayemi, A. R. (2011) submitted that it is a fact that the 1999 constitution has guaranteed every Nigerian the right to practice the religion of his choice; since the conventional banks and financial institutions operate on *riba* and engage on other un-Islamic transactions, the provision of Islamic alternative to the Muslims becomes a Constitutional right.⁸⁵

Eyeyie, E. (2011) observed that Islamic banking is just a name as it is a non-faith, non-biased and not restricted to Muslims. About 60 per cent of the shareholders of Jaiz are Igbos from the South-East. Discrimination is strictly prohibited. It is open to Christians and everybody. Islamic banking is operating in 75 countries of the world including Britain, USA. He said since its products and services are not restricted to Muslims, but open to all, everybody should be ready to accept it.

⁸⁵ Olayemi, A.R., The Legality of Islamic Banking in Nigeria: A Critical Approach, (2011), SSRN, available at <http://ssrn.com/abstract=1941010> Retrieved December 12, 2014

Ahmad, M. Y. (1994) argued that the establishment of an Islamic bank does not necessarily tally with the Islamisation of the Nigerian economy as critics may suppose, though such Islamisation may be desirable for the fulfillment of a basic tenets of Islam; the running by Muslims of their economic affairs in line with their religion.

Safieddine, S (2011) narrated about first Muslim migration that when Jaafar, spokesman of the Muslim immigrants, completed his recitation, Najashi, the King of Ethiopia, was in tears. He said that my religion (Christianity) and yours (Islam) is only separated by a very thin line. He then turned to the Qurash, who pursued the Muslims, and said he will not hand over the latter to them. And the Muslims have the right to stay in his land up to the time they wanted.

This research also aims to establish that Muslims and Christians in Nigeria should unite for their common constitutional right to worship as both religions have prohibited usury. Hence, the need to amend section 38 of the 1999 constitution to unambiguously include conducting business or commercial transactions, according to the scriptures, form part of the fundamental right to worship.

The issue of the powers of the governor of CBN to issue IBF licenses, as challenged in the unreported case of *Godwin Sunday vs. CBN Governor and another*, was as well, briefly discussed as it is not the main theme of this study.⁸⁶ (Sec. 33 CBN Act must be amended to empower the CBN Governor to issue license in addition to supervision by way of issuing guidelines)

The operation of IBF is not without some challenges; according to El-Gamal, M. A. (2000), abuses of the terms 'Islamic banking and finance' in a number of Islamic countries have precipitated a degree of skepticism among the Muslim population. The view that the

⁸⁶ *Godwin Sunday Ogboji V Governor Of Central Bank Nigeria & Ors* [Fhc/Abj/Cs/710/2011]

field consists of nothing more than mere nomenclature has become too deeply rooted in the minds of many sincere Muslims because of those abuses. That skepticism turned cynical when educated Muslims examined careless statements by early proponents of the field of IB in those countries. Such utterances show that the differences between the Islamic model of finance and its conventional (western) counterpart should be obvious without any need for further education. Since the behavior of early IB seemed to casual observers to be very similar in function and form to conventional banks, the field was summarily dismissed as mere window-dressing that does not achieve the real objective.

Bambale, Y. Y. (2007) Islamic banking system deserves acceptance from both Muslims and non-Muslims not just because it is in consonance with Islamic economic system, but also because it comes along with huge benefits that will serve as anti-dote to the current global economic meltdown. Islamic law permits and encourages Muslims to partake in lawful commercial transactions

Ayilara, D. (2012), despite the huge benefits associated with the acceptance and use of the IBF system, it still faces a lot of challenges in Nigeria one of which is stiff resistance from non-Muslims in Nigeria for example in the words of Ayilara, the Islamic banking will fail woefully in Nigeria for the following reasons: It shall cause disorientation in the government and division among the citizens. The government should not use public funds to institute a religion based banking system which will not make profit but serve as a constant draining pipe for some Mafiosi and cliques. The economic miracle and major infrastructural development of the Muslim world was created not by or with Islamic banking but by Western-style economic program of investment to make money and re-investment to get higher profit and greater market share.⁸⁷

⁸⁷Ayilara, D., Islamic banking: How suitable for
Available at www.tribune.com.ng Retrieved January 2, 2012

Similarly, Okojie (2012) stated that they are against the operation of Islamic banking in Nigeria because they see it as another deliberate move to subjugate Christians in Nigeria. Nigeria is a secular state. He stated further that they must be very sensitive to the religious beliefs of others. Introducing Islamic banking in Nigeria will further aggravate the culpable religious tension in the country already being hoisted by the radical sect Boko Haram.

Adekomi, F. (2012) a chartered accountant, opined that he would like the CBN governor and other stakeholders to understand that Nigeria is presently combustible, as every development, political and otherwise, have been tied to religion. He added that Nigerians are very religious and the stakeholders involved should know and respect this. If the Christians say we want to have Christian banking, or *Babalawos* say it is time for *Ifa* banking. He added that though Islamic banking is worldwide and generally accepted, it is not widely practiced, due to its religious nature and there is nothing saying we should not respect that in Nigeria too.

It is apparent that this position (dislike) for IBF is not objective; it is born out of hatred for Islam and Muslims leading to rejection of anything that comes from Muslims no matter how beneficial it is. Despite the Abuja High Court decision by Justice Gabriel to the effect that the Jaiz Bank was illegally licenced by the CBN Governor, the Bank still continues its operations because its license was not revoked due to the Plaintiff's lack of *locus standi*, that is not coming to court through the Federal Attorney General who has the power to ask for the revocation.

Interestingly, IBF is well received and celebrated in other secular jurisdictions as could be seen below.

According to Abdullah *et al*, (2012) notwithstanding its name, IBF is fast gaining grounds with non-Muslims worldwide due to its strict lending principles, reflecting industry efforts to transcend religious beliefs to gain greater market share. Since Shari'ah finance is a blend

of Islamic economics and modern lending principles, its products can be sold to Muslims and non-Muslims alike. While it was previously a small segmented market catering only to Muslims who wanted to avoid interest-based conventional banking, Islamic finance has been successful in attracting a wider circle of followers in recent years due to cash-rich Gulf Muslim investors and rising demand for ethical investing. Non-Muslim investors have also been looking for less risky alternatives since the onset of the global credit crisis over a year ago that has cast doubt on many western risk management practices.

Olaoye, I. K., *et al*, (2013) observed that there is no doubt that the Central Bank of Nigeria is doing its best in ensuring that it effectively regulates and stabilise the banking business in Nigeria. Though Islamic banking is promising and has been given license to operate in Nigeria, the secular nature of the country has made some quarters skeptical and opposed to its operation.

Daud, M. *et al* (2011) rightly observed that the major challenges for IBF in Nigeria include capital inadequacy, lack of Shari'ah governance institutions, manpower shortage, Islamophobia on the part of non-Muslims and a host of others. These problems can definitely be overcome with patience, plan and perseverance.

Alao, D.O., and Alao, E.M., (2012) added that the complaints by those against issuance of license to Jaiz international could have been valid given that Christian oriented body or other interested groups filed in papers to commence non- interest banking was refused. This argument therefore amount to putting the cart before the horse. It is equally true that Non-Interest Banking date back to about 1444 B.C and rooted in the Jewish practice of lending money by an Israelite to a fellow Israelite without charging usury or interest as commanded in the Holy Scripture. It is worrisome that the Christians slept too long on such an issue that borders on being our brothers' keeper; it is taking them time to accept IBF which brings about financial and economic gains on the people of all faiths. If the

guidelines in principle contravene the secularity of Nigeria as enshrined in Section 10 and Section 38 (1) of the CFRN concerning adopting any religion as State Religion and freedom of thought, conscience and religion, the court could decide in such matter in order to correct excessiveness if any. In addition, if the creation of CBN Shari'ah Council is said to be offensive to Christians, they could advocate same when non-interest Christian Banking system comes up and that will allay the current fear.

Aliyu, (2013) stated that the fear that the introduction of Islamic banking in Nigeria is a grand attempt to Islamize the country has been expressed in many quarters with various degrees of threats and intimidations. However, looking at the history, the structure of the Nigerian economy and the confluence of the sections; the regions, the tribes, the culture and religion in the Nigerian State, one will appreciate the level of accommodation and sacrifice made in keeping the nation together. The conventional banking system, which predates the country's independence and the federal system of government comprising of the executive, legislature and judiciary, are more strange-bed fellows to the Muslims and their religion, in the Nigeria, than it is to the Christians and their faith.

Nwaolisa, EF and Kasie, E.G., (2015) opined Muslims patronized the conventional banks out of necessity and, when another entrepreneur the Islamic banker offered to address their concern, many Muslims turned towards it.

Fatai, B.O. (2012) added that the viability of the system in Nigeria is faced with a lot of challenges but the benefits are significant and numerous enough that the opportunity cannot be neglected easily, therefore, if the challenges are adequately taken care of, in form of; the government playing an important role in providing a conducive environment for the Islamic banks to operate, introduction of appropriate rules and regulations to protect both banks and customers, creation of mass awareness and so on, Islamic Banking can be workable in the foreseeable future.

Abikan A. I. (2009) asserted that in view of the fact that the right to religion is a Fundamental Right under the Nigerian Constitution; the Nigerian Muslims are entitled to be given opportunity to operate their economic activities in a manner conducive to their religious belief. Such opportunity would mean provision of a level playing ground in a pluralistic society where citizens should have choice of how they conduct their business. Much as no one is to be compelled to participate in the new system, justice would also demand that no one is excluded from using or implementing it.

Imam and Maryam (2014) are of the view that Muslims should not succumb to the efforts of the anti-Shari'ah cliques.

As the IBF system is now globally accepted, Nigerian Christians opposed to it should better join their fellow Christians who now form the majority of the shareholders in Jaiz Bank.

Sanusi, L. S. (2011) officially disclosed that the 60% of shareholders (not 60% of Nigerian non-Muslims) in the only fully fledged IB, The Jaiz Bank, in Nigeria are Christians of the Igbo tribe.

Abdul-Hamid, M. (2013) stated that the world centers of the system are all in Asia with Malaysia taking the lead as a global hub.⁸⁸ He also said that the glamour by Muslims to have every part of their lives governed by the perfect laws of Allah is directly connected with the unprecedented growth and success of the system across the globe.

Abdul-Razzaq A. A., (2013) reiterated that with the economic viability and the legal compatibility of NIB proven beyond any reasonable doubt, it would amount to gross injustice to

⁸⁸ Abdul-Hamid, M. (2013), *Malaysia as a Hub for Islamic Finance: On Choice of Law and Forum for Settlement of Disputes*. Islamic transactions and finance: principles and Developments, Part 2:99-114.

deny citizens of Nigeria the right to enjoy the benefit of the IBF as enjoyed by their counterparts in many countries of the world today.

This effort by Nigerian Muslims could be as a result of what Buang, A. H. (2007) described as Muslims' efforts to avoid social decay by being indifferent to IBF by them.

Buang, A. H. (2008) stated that in Islamic States like Malaysia, the need to refocus attention on the improvement of Islamic principles in all business affairs has been re-echoed by scholars.

Gelbard, E., et al (2014) narrated that IBF was long started in Egypt as the first African nation to introduce the system.

However, notwithstanding the oppositions, the sky will be the limit for the system in Nigeria if the suggestions put forward in this research are implemented.

Ardo, A. (2014) explained the developments so far; he said two banks, Jaiz Bank Plc. and Stanbic IBTC, were granted licenses to operate based as a full-fledged Islamic bank and window respectively in the same year and both began operations in 2012. Sterling Bank Plc. Also joined the market in April 2013 as a window

If Nigeria could emulate the legal steps taken by Malaysia, leading to the enactment of the current FSA 2013, to legislatively strengthen the system, it will go a long way in becoming the hub of the system in Africa in the very near future.

Hasani, I (2009) said there are three other Malaysian Legislations regulating IBF operations vis-à-vis the FSA 2013:

First, Government Investment Act (GIA) 1983 was enacted to enable IB to invest in noninterest bearing Government Investment Certificates (GIS); also known as interbank market.

Second, Banking and Finance Investment Act enables non-Islamic Banks to operate IB Windows under the IB Scheme (IBS).

Third, The Central Bank National Shari'ah Advisory Council (CBNSAC) Act 1997 makes the IB Shari'ah advisors subordinate to the CBNSAC which is the sole supreme advisory authority on IB and Takaful.

Norhashimah MY (2015) revealed that in Malaysia now almost every commercial bank offers IB which attracts both Muslim and non-Muslim customers.

2.8 ADR (Alternative Dispute Resolution) as a Supplement to the Limited IBF Adjudication Related Provisions in the 1999 Nigerian Constitution

Allah directs:

“*Wassulh Hairun*, meaning reconciliation, ADR or settlement out of court is best.

(Qur'an, Nisa 4:128; Qur'an, Al-Baqara 2:49).

He further ordained:

“The believers are but a single brotherhood, so make peace and reconciliation (*sulh*) between two (contending) brothers; and fear Allah, that ye may receive mercy.”(Qur'an, al-Hujarat: 10).

In yet another verse, the Qur'an ordered:

“If two parties among the believers fall into a quarrel, make ye peace between them...with justice, and be fair: for Allah loves those who are fair (and just).”

(Qur'an, al-Hujarat: 9).

The Quran sets the procedure as such:

“The arbiters between a husband and wife are advised to start by mediation between the couples, if that proves difficult or impossible, and then the arbiters will advance to arbitration.” (Qur’an, an-Nisa: 35).

The Prophet (PBUH) equally advised, in an authentic hadith, that there is great reward attached to ADR (Alternative Dispute Resolution which is called *Sulh* in the Shari’a). While counting the acts of piety, the prophet (PBUH) stated that making *sulhu* between two people is a *sadaq* (charity).⁸⁹

According to Zahidul Islam, MD, (2012) the word *sulh* literally means “to cut off a dispute” or to “finish a dispute” either directly or through the help of a third party.

Rashid, S. K. (2004) defined ADR as the name given to the out of court settlement mechanism for disputes between people.

Oseni, U. A. (2013) explained that it has a range of processes for amicable resolution of disputes outside the formal court procedure or litigation where a neutral third party often intercedes to resolve the dispute. He further said that the popular ways of settlement of dispute under the Shari’ah are *sulh* (conciliation) and *tahkim* (arbitration).

Rashid, S. K. (2004) elaborated that the ADR processes in Islamic law are based on the Qur’an and traditions of the prophet (PBUH) hence it has a religious undertone thereby demanding unquestionable compliance hence making it unique and unparalleled among the legal systems of the world.

Malkawi, B.H. (2013) related that the practice of arbitration is seen as a very important part of Islamic history. For instance, the conflict between Ali and Muawiyya on who was

⁸⁹ Bukhari, vol. 3, hadith 857.

to become the khalifa was put to arbitration at the instance of Muawiyya. That is to show how important the companions have taken the issue of arbitration.

In *Opebiyi & Ors v. Noibi & Ors*, it was pronounced that a dispute over leadership succession cannot be submitted to arbitration. It is to be noted that though the community seeking to arbitrate its dispute in this case was wholly a Muslim community, no evidence of the existence of Islamic customary arbitration (Tahkim) was led in evidence before the court, as required by law when seeking to prove the existence of any custom.⁹⁰

Since Islamic law is not customary law⁹¹ and *Sulh* is a Qur'anic injunction on Muslims, this Supreme Court decision should be seen as not referring to the Islamic law of *Sulh* but about customary law leadership succession.

Abikan, A. I. (2011) lamented that in view of the pluralized nature of the Nigerian legal system, with majority Muslim population whose religion prepares ADR to litigation, it becomes difficult to understand why such serious lacunae are allowed to continue.

The ADR procedure is simpler than the normal adjudication as well as cost and time saving.

According to the Multi-Door Courthouse Mediation and Arbitration Rules 2003 of Lagos state, Nigeria, the terms of settlement will be endorsed by the court as a sealed order of the court, hence having the weight of a court decision.⁹² Most states of the federation have laws that back the ADR process. For example in Kano state, the Kano State Arbitration Law, in addition to the Mediation and Arbitration Rules 2008, are all legislations towards the advancement of ADR in the state.⁹³

⁹⁰ (1977) NSCC p. 464.

⁹¹ *Alkamawa v Bello* (1998) 8 NWLR (Pt.561) 173 where Wali JSC stated that Islamic law is not the same as customary law as it does not belong to any particular crime.

⁹² The Multi-Door Courthouse Mediation and Arbitration Rules 2003 Lagos state.

⁹³ Section ss22 and 116 Kano State Arbitration Law.

By Order 38 of the Rules of Civil Procedure of Lagos State, Nigeria, if a settlement of the dispute is reached, it shall be reduced to writing and signed by the parties and or their counsels. A Settlement agreement executed by the parties at an ADR Session is deemed to be an Offer to settle which is accepted within the meaning of the High Court Rule.⁹⁴

Oseni, A. U. (2012) stated that in Malaysia, ADR is done through the KLCMC (Kuala Lumpur Court Mediation Centre), KLRCA (Kuala Lumpur Regional Centre for Arbitration) and FMB (Financial Mediation Bureau). In Nigeria, it is done through Arbitration only.

Buang, A. H. (2007) observed that most of the reported cases on IBF in Malaysia involve non-performance of the bank's customer by defaulting payment due under *bay' bi thaman 'ajil* (BBA or deferred payment sale), *ijārah* (lease or rent), and *bay' istisnā'* (manufacturing contract).

2.9 Chapter Conclusion

It is evident that the reviewed literatures have examined the legal aspects of IBF in Nigeria from different perspectives. Some concentrated on the historical evolution of the bank while other examined it from the global trend and the promising venture it poses. Some literature discussed the trend and challenges Islamic banking in Nigeria. This research varies from other literatures by going beyond advancing the frontiers of knowledge in the field of Islamic Law of Banking. It clears the ambiguity and misconceptions about the field and Islam in general. Importantly, it looked at the lacunae in the laws and suggests ways to cushion these weaknesses. It did not only stopped at looking at its laws, prospects and challenges in Nigeria, it also further looked at the modalities of having a smooth legal operations through new policies and legislations as well as panel beating existing crooked

⁹⁴ Order 38 of the Rules of Civil Procedure of Lagos State.

laws such as the BOFIA and the Constitution for the harmony of the Country. The Jurisdiction of Shari'ah Courts⁹⁵ needs to be enhanced to handle Islamic Banking cases to, inter alia, enable Muslims settling their disputes within the spectrum of their faith as of right.⁹⁶ Alternative Dispute Resolution (ADR) should be adhered to, especially in the wake of the security situation in the country, to supplement the limited provisions of the 1999 Nigerian constitution which is imbued with gaps as analysed in Chapter three.

Amendments to related laws, especially the constitution itself, were suggested as well as on IBF Laws syllabus in Nigerian educational institutions to solve the said man power problem. It clearly demonstrated that the system is the hope for the future and an antidote to the current global economic meltdown which is evident from the spread of its products and success worldwide.⁹⁷ This is all aimed at serving humanity through legally buttressing IBF for the harmony, peace, prosperity and unity of Nigeria and indeed other nations.

⁹⁵ Section 277 CFRN 1999.

⁹⁶ Ibid. Section 38(1) provides for freedom of Religion.

⁹⁷ The World Islamic Bank Competitiveness Report 2011-12, ERNST AND YOUNG – Found in [www.ey.com/publication/vwLAssets/IBCR_Report/\\$FILE/IBCRReport2011\(LR\)Final.pdf](http://www.ey.com/publication/vwLAssets/IBCR_Report/$FILE/IBCRReport2011(LR)Final.pdf) Retrieved September 14, 2015.

CHAPTER 3: ANALYSIS AND DISCUSSIONS ON THE IBF LEGAL FRAMEWORK AND THE CONSTITUTIONAL *LACUNAE* ON ITS LITIGATIONS IN NIGERIA

3.1 Chapter Introduction

The history of the Nigerian Constitution can be traced back to the period before independence.⁹⁸ When the north and southern protectorates were amalgamated in 1914, there was the need to have a constitution that will put together the two regions under the same law. That resulted in the coming of the first Constitution of Nigeria during the colonial era named the Independence Constitution, 1960. This was followed by the Republican Constitution 1963, then the 1979 Constitution. The current one, which is the subject of this research, was enacted in 1999. Several factors could be mentioned as responsible for those changes, but the major player was the incessant interjection of the military by overthrowing democratically elected governments through coup *d'état*. When they deposed the democratically elected governments, they suspended the Constitution and redrafted new Constitutions when they intended to hand over power to new civilian administrations; hence, the lapses in our constitution regarding Islamic law generally and IBF in particular.

Constitutions are multipurpose documents; they serve as Article of Association between various heterogeneous groups living in a country.⁹⁹ They are documents of rights for the government and the governed and they are “manuals” of governance which ought to be constantly referred to and be updated.¹⁰⁰ One remarkable feature of the Nigerian Constitution is that it is always written and supreme. Unlike in England where the

⁹⁸ Nigeria got its independence from Britain on 1st October, 1960.

⁹⁹ Lawan, M., (2010). Constitutional Base for Good Governance in Nigeria *Bayero University Journal of Public Law (BUJPL)* Vol. 2 No. 1, 64.

¹⁰⁰ *Ibid.*

parliament is supreme,¹⁰¹ in Nigeria, the Constitution is the Supreme law¹⁰² and the government of Nigeria shall not be governed except through the Constitution.¹⁰³ In the case of *Momoh V Senate of The National Assembly* the court held that Section 31 of the Legislative (Powers and Privileges) Act, which prohibits the execution of court process within the premises of the legislative house while the house is on session, is inconsistent with section 42 of the 1979 Constitution and by virtue of section 1 of the Constitution, section 31 of the Legislative Powers and Privileges Act is void to the extent of its inconsistency.¹⁰⁴

The Constitution has vested the judicial powers in the courts.¹⁰⁵ These courts could be established by the constitution or established by other laws other than the constitution.¹⁰⁶ The Nigerian courts can be categorised into superior courts of record and courts other than the superior courts of record. The latter are those courts that are expressly established by the Constitution.¹⁰⁷ While courts other than the superior courts of record are those courts that are established by other laws other than the constitution.¹⁰⁸ The constitution established the courts of record in a hierarchical order. These courts are the Supreme Court,¹⁰⁹ the Court of Appeal,¹¹⁰ the Federal High Court,¹¹¹ the National Industrial Court,¹¹² the High Court of the Federal Capital Territory,¹¹³ the Shari'ah Court of Appeal

¹⁰¹ *Lee Bude v Torrington Railway* (1871) L.R. 6 C.P. per Willes J.

¹⁰² Section 1(3) CFRN; *African Continental Bank PLC v LOSADA (NIG) LTD* (1995) 7NWLR 26.

¹⁰³ *Ibid.* Section 1(2).

¹⁰⁴ (1981) 1NCLR 21.

¹⁰⁵ Section 6 CFRN 1999.

¹⁰⁶ It is important to mention that organizations' judicial powers to try and take disciplinary measures against their erring members are exceptions. For example, the Nigerian Bar Association and the Nigerian Medical and Dental Association can conduct trial in respect of their members accused of wrongs in their professional capacity. *Fewehinmi v NBA* (1989) 2 NWLR (PT 107) 558.

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

¹⁰⁹ Section 230 CFRN 1999

¹¹⁰ *Ibid* Section 237.

¹¹¹ *Ibid* Section 249.

¹¹² *Ibid.* Section 254.

¹¹³ *Ibid.* Section 255.

Federal Capital Territory,¹¹⁴ the Customary Court of Appeal of the Federal Capital Territory,¹¹⁵ the High Court of a State,¹¹⁶ the Shari'ah Court of Appeal of a State¹¹⁷ and the Customary Court of Appeal of a state.¹¹⁸ With respect to the Shari'ah Court of Appeal of a State and the Customary Court of Appeal of a State the constitution states that it shall be for a state that needs it.¹¹⁹ This constitutional provision is informed by the fact that the legal system of Nigeria is pluralized in nature.¹²⁰ Muslims constitute the majority population in the northern states and Islamic personal law is predominantly used to state disputes and as such there is the need to have a Shari'ah Court of Appeal that entertains appeals from the decisions of the Shari'ah courts at the lower levels.¹²¹ In the southern states, customary laws are the predominant laws and as such there is the need to establish a Customary Court of Appeal that entertains appeals from the customary courts that should be presided over by judges trained in customary law.¹²²

In addition to the courts of records or superior courts established by the Constitution, National Assembly and the State Houses of Assembly have the jurisdiction to create courts and bestow them with jurisdiction. The State Houses of Assembly can confer additional jurisdiction on the Shari'ah Court of appeal.¹²³ Appeals from the decisions of the courts established by the state laws lay in the superior courts established by the Constitution. With

¹¹⁴ Ibid. Section 260.

¹¹⁵ Ibid. Section 265.

¹¹⁶ Ibid. Section 270.

¹¹⁷ Ibid. Section 275.

¹¹⁸ Ibid. Section 280.

¹¹⁹ Ibid. Sections 270 & 280.

¹²⁰ The pluralized nature of the Nigerian legal System is informed by the fact that the legal system has several sources which includes local legislations, common law of England, doctrines of equity and statutes of general application enforced in England on or before 1st January, 1900. Others include Islamic law, customary law, case law and foreign laws. Tobi, N. Op. Cit.

¹²¹ Yusufari, M. (2004). Sharia Implementation in Kano State, a report submitted to an International Conference on "the Implementation of Sharia in a Democracy: The Nigerian Experience" held at Sheraton Hotel, Abuja between 7th and 9th July, 2004 jointly organized by the Centre for the Study of Islam and Democracy, Washington D.C. and the Centre for Islamic Legal Studies, ABU Zaria, Nigeria.

¹²² See sections 280-285 CFRN 1999

¹²³ Section 277 CFRN 1999; this is an opportunity to confer the SCA (Sharia Court of Appeal) with jurisdictions on criminal cases and Islamic Banking and Finance (IBF) matters.

respect to cases relating to Islamic law, the states in northern Nigeria have established the Shari'ah Court and Upper Shari'ah Courts at the lower levels to entertain matters relating to Islamic personal laws. All appeals from the decisions of the Shari'ah Court lay in the Upper Shari'ah court and the decisions of the Upper Shari'ah Court lay in the Shari'ah Court of Appeal established by the Constitution.

With respect to matters that relate to Islamic law, out of the courts of record, the Supreme Court, the Court of Appeal and the Shari'ah Court of Appeal have jurisdiction to entertain matters that relate to Islamic law in their appellate capacity. First in the hierarchy of courts in Nigeria is the Supreme Court.¹²⁴ It is the apex court that has unlimited jurisdiction to entertain all appeals from the Court of Appeal.¹²⁵ It equally has original jurisdiction to entertain matters that relates to dispute between states or between states and the federal government.¹²⁶ The court constitute of a maximum of 21 judges out of which some are learned in Islamic law.¹²⁷ For a person to be qualified to be appointed as a justice of the Supreme Court, he must have been called to the Nigeria Bar for at least 15 years.¹²⁸ The appointment of a person to the office of the chief Justice of Nigeria or a Justice of the Supreme Court is made by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate.¹²⁹ With respect to the Justices that reach the Supreme Court as experts on Islamic law, they must have the required knowledge on Islamic law that will be discussed under qualification to the post of a Kadi of the Shari'ah Court of Appeal.

¹²⁴ Just like Nigeria, the Supreme Court is the apex court in Malaysia.

¹²⁵ Section 233(1) CFRN 1999.

¹²⁶ Section 232(1) CFRN 1999.

¹²⁷ Judges from the court of Appeal get promoted to the Supreme Court. Some of the judges are experts on Islamic law hence when any case that relates to Islamic law is brought before the Supreme Court; it is the justices that are experts on Islamic law that will sit in the case.

¹²⁸ Section 231(3) CFRN 1999.

¹²⁹ Ibid. Section 231(1).

The Court of Appeal comes next to the Supreme Court in the hierarchy of courts.¹³⁰ It has both original and appellate jurisdictions. It has original jurisdiction with respect to election petitions that relates to the office of the President or Vice President of the Federal Republic of Nigeria.¹³¹ It is equally the only court conferred with jurisdiction to entertain appeals from the Federal High Court, National Industrial Court, Court Martial, High Court of the Federal Capital Territory Abuja, Shari'ah Court of Appeal of the Federal Capital Territory Abuja, Customary Court and High Court of the Federal Capital Territory Abuja, the High Court of a State, Shari'ah Court of Appeal of a State and Customary Court of Appeal of a State.¹³² The court constitute of at least forty nine justices out of which at least three must be learned in Islamic personal law and three in Customary Law.¹³³ Judges expert in Islamic personal law are to sit whenever the court is sitting on matters affecting Islamic Law. For a person to be qualified for appointment as a judge of the Court of appeal, he must be qualified as a legal practitioner for at least 12 years.¹³⁴ This is in addition to the knowledge of Islamic law that is required from those that are promoted from the Shari'ah Court of Appeal. The appointment to the office of a Justice of the Court of Appeal is made by the President on the recommendation of the National Judicial subject to confirmation by the Senate.¹³⁵

A major problem faced by the Kadis of the SCA who are not lawyers, when it comes to promotion to the FCA, is that, although they have deep knowledge of Islamic law, the constitution requires 12 years of call to the Bar to qualify. The fact that they are not lawyers has incapacitated them and as such they cannot grow to the Court of Appeal despite their knowledge in Islamic law. That means that, at the Court of Appeal and the Supreme Court,

¹³⁰ Ibid. Section 237(1).

¹³¹ Ibid. Section 239(1).

¹³² Ibid. Sections 242-248.

¹³³ Ibid. Section 237(2).

¹³⁴ Ibid. Section 238(3).

¹³⁵ Ibid. Section 238(2).

the knowledge and experience of persons learned in Islamic law will not be utilized. That is indeed a great set back and disadvantage to Shari'ah cases. Another problem faced in Shari'ah cases at the Court of Appeal is that due to the busy schedule of the Justices,¹³⁶ Shari'ah cases are not heard in time. Sometimes, it takes years for the Court of Appeal to dispose of Shari'ah cases.

Before the arrival of colonial administration, Shari'ah courts administer both civil and criminal jurisdictions in most parts of Northern Nigeria. Upon arrival, the colonial administration, through their indirect rule system, preserved the Shari'ah courts but gradually assumed control of their administration. The Native Proclamation of 1900 was enacted for "the better regulation and control of native courts". It took control of the Shari'ah courts away from the Emirs and placed it in the hands of the British Resident who was not even a Muslim.¹³⁷ In 1933, the Native Courts Ordinance among other things changed the name of the Shari'ah or Alkali courts to Native Courts. This position continued after independence until the Area Courts Edict, 1967¹³⁸ overhauled the Native Courts system. This Law among other things abolished the Emir's court and changed the name of Native Courts to Area Courts.¹³⁹ By this, all the technicalities of the common law were introduced to Islamic courts and the hitherto simple, cheap and accessible Islamic justice became part of history. Judges who were unlettered in Islamic Law were empowered to administer Islamic civil causes.¹⁴⁰

¹³⁶ Especially during election period, because all cases related to election comes to the court of Appeal. In fact it is even the final court of appeal with respect to governorship election. Election cases have a time frame within which the court is expected to dispose of the cases. That will force the justices to concentrate on election cases more to the disadvantage of appeals especially from the Sharia Courts because of the shortage of the experts on Sharia without whom sharia cases cannot be heard.

¹³⁷ Oba, A.A., (2008). Neither Fish nor Fowl: Area Courts in the Ilorin Emirate in Northern Nigeria. *Journal of Legal Pluralism*. vol. 58, 71.

¹³⁸ Now called the Area Courts Law, 1967

¹³⁹ Oba, A.A., Op Cit., 71.

¹⁴⁰ Abikan, A.I., (2002). The Application of Islamic Law in Civil Causes in Nigerian Courts, *Journal of International and Comparative Law*, vol. 6, 3

After independence, at the lower level, the Shari'ah courts were the courts of first instance with respect to Islamic law.¹⁴¹ The courts are established by the State Houses of Assembly. They are manned by area court Judges who are often persons with knowledge of Islamic law. The Area courts are courts with limited jurisdictions in both civil and criminal cases.¹⁴² Depending on the state, the monetary jurisdiction of the area court is often small. That has led to a situation where most of the cases decided by the area courts relate to marriage, divorce, custody, guardianship etc.¹⁴³ Most area courts do not have jurisdiction in inheritance matters because the properties are often *ultravires* (beyond) their financial jurisdiction.¹⁴⁴ This should also be amended to enable them handle IBF matters.

Appeals from the decisions of the Shari'ah courts lay in the Upper Shari'ah Courts. The Upper Shari'ah Court is a court of unlimited jurisdiction in matters relating to Islamic personal law.¹⁴⁵ That has made the Upper Shari'ah Court a very important court whenever mention is made of Shari'ah cases. All decisions of the Upper Shari'ah Courts are binding

¹⁴¹ Some states use the phrase 'Area court'. With the introduction of Sharia in most northern states in 2001, most states changed the name from 'Area Court' to 'Sharia court' and 'Upper Area court' was also changed to 'Upper sharia court'.

¹⁴² In some states the jurisdiction of the Area courts is restricted to civil cases. That means the court does not have jurisdiction on issues that are criminal in nature even if the matter relates to Islamic law. For example under the Penal Code, applicable to the northern states of Nigeria, taking of alcohol, incest and adultery were offences. This is because the Penal Code which applies in the northern states of Nigeria which is predominantly Muslim areas, came into being to replace the Islamic law of crime that was fully operational in northern Nigeria before the coming of the colonialists. It was given some Islamic flavors in the form of prohibition of acts that are offences under Islamic law but with lighter punishments. Haddi punishment was also introduced in the Penal Code which involves canning. But the Hadd punishment is not the same with the Islamic manner of canning because under the Hadd lashing, it is expected that the canning should be made by a person of average height and strength see Shaheed, A. Q., (2005). *Criminal Law of Islam, New Delhi: Adam Publishers & Distributors*, 2005, 45; See another book of the same title: Anwarullah, C., (2006). *The Criminal law of Islam, India: Kitab Bhavan*, 80.

In administering the canning he must not raise his hands above his elbows and must not use his thumb and index finger. That has shown that Haddi lashing is only meant to be a disgrace and not the infliction of the physical pain. Under the sharia, canning is not meant to be for the purpose of disgrace alone but also for the purpose of the infliction of physical pain. For example the son of caliph Umar died due to pain and injury caused by the canning administered on him for the crime of adultery he committed. See Qur'an., Nur 24:1

¹⁴³ Oba, A.D. (2004). *The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction, The American Journal of Comparative Law*, 859

¹⁴⁴ See generally the Area Courts Edict 1968.

¹⁴⁵ In the states where the Upper Sharia Court has jurisdiction over criminal matters, the jurisdiction is limited. The court has no jurisdiction on offences like culpable homicide.

on the Shari'ah Courts and appeals from the decisions of the Upper Shari'ah Court go to the Shari'ah Court of Appeal. Where it relates to matters which the Shari'ah Court of Appeal has no jurisdiction, then the appeal goes to the High Court. The Upper Shari'ah Court is headed by an Upper Shari'ah Court judge who is expected to be a person learned in Islamic law. Interestingly, in some states like Adamawa it is now a practice that a person only becomes qualified for appointment to the office of a judge of the Upper Shari'ah Court only if he is qualified as a legal practitioner.¹⁴⁶

On jurisdiction over persons, the Shari'ah Courts and Upper Shari'ah Courts have jurisdiction over Muslims and any other person who has consented to the jurisdiction of the court thus its jurisdiction on persons is restricted. A Christian or any other person professing any other religion other than Islam can only be tried or a case in which he is a party can only be tried by the Shari'ah Courts, if he consents to such trial. With respect to technicalities, the Shari'ah courts are not bound by technicalities as is the case in the Magistrates and High Courts; and hence a decision of a Shari'ah court cannot be turned aside on the basis of a failure to abide by the technicalities of trial.¹⁴⁷ Lawyers have the right to audience in these courts due to the fact that the Legal Practitioners Act gave the lawyers the right to appear in all courts in the Federal Republic of Nigeria.¹⁴⁸ Since lawyers can appear in the Area or Shari'ah Courts, since the level of justice required in the lower courts is the same as those courts mentioned in the constitution (Courts of Record) and since the lower courts are the ones closer to the people, they also be made courts of record and included in the constitution. I can attest to the fact that they impact more to the society than the superior courts having served as Deputy Chief Registrar/Director of Shari'ah Courts in the Borno State of Nigeria. The lawyers among the Judges who also had LLB in

¹⁴⁶ In Adamawa state even non-Muslims are appointed as judges of the sharia court and upper sharia court.

¹⁴⁷ *Kuusu v Udom* SC 174/1986.

¹⁴⁸ Section 2 of the Legal Practitioners Act.

Shari'ah are fit to handle any modern or complex IBF matter. Buang asked the pertinent question:

“If civil courts (in Malaysia) should consult the NSAC (of Bank Negara) in IBF matters, why should the Shari'ah Court Judges, who are equally learned in the Shari'ah, be denied jurisdiction in such matters?”¹⁴⁹

He also, rightly, argued that if Shari'ah Judges are seen as incompetent in handling complex IBF matters, the Civil Court Judges equally lack the necessary knowledge of the Shari'ah.¹⁵⁰

Though the Shari'ah courts are meant to be courts that are vested with the jurisdiction over issues of Islamic personal law, as in Malaysia¹⁵¹, they are, nonetheless, under the control of the Chief Judge of the state and not the Grand Kadi. The appointment, promotion or discipline of a Shari'ah Judge is sanctioned by the Chief Judge who is, often, not trained in Islamic law and could even be a non-Muslim. This situation is unfortunate and significantly play important role in the employment of unqualified persons to serve as judges of the Shari'ah Courts. The problem is further compounded by the fact that some of these judges get promoted as Kadis of the Shari'ah court of Appeal, then to the Court of Appeal and even the Supreme Court to decide on Shari'ah matters. This is proved in Adamawa state where non-Muslims are appointed as Shari Court Judges. The constitution should be amended to create a Shari'ah Judicial Service Committee in the states and Federal headed by the Grand Kadi and a Muslim Justice of the Supreme Court heading the Shari'ah Panel respectively to handle issues affecting the Shari'ah courts and the Kadis or Shari'ah Justices in the Courts of Record.

¹⁴⁹ Buang, A. H. (2007). Op. Cit., 322.

¹⁵⁰ Ibid, 322.

¹⁵¹ Ibid, 318.

Another problem faced by the Shari'ah Courts is the issue of funding. The courts are inferior courts and are not benefiting from the comfortable salaries and allowances enjoyed by the superior court judges. That has left the judges and other staff of the Shari'ah court under uncomfortable situation. The court buildings are old and have no enough furniture. The judges sometimes buy the materials for writing the court proceedings. The result of all these is making the courts accommodate corruption which in turn negatively affect the court and its judgment.¹⁵²

Going by the Common law principle of *stare decisis* which applies in Nigeria, all the decisions of the superior courts are binding on the Shari'ah Court and the Upper Shari'ah Courts. The decisions of the Supreme Court, Court of Appeal and Shari'ah Court of Appeal even if they are established *per curiam* (court decision based on decision of a number of judges in the panel), the Shari'ah courts at the lower level are obliged to follow them.¹⁵³ Under Islamic law, the common law principle of *stare decisis* is not recognized. A lower court is not obliged to follow the decisions of a superior court if it contradicts the texts of the law.¹⁵⁴ There should be a provision in the constitution to exempt the Shari'ah Courts from adhering to the principles of *stare decisis*.

Appeals from the Shari'ah court lay in the Shari'ah Court of Appeal in matters where the Shari'ah Court of Appeal has no jurisdiction, for example criminal matters, appeal lie in the High Court. The Shari'ah Court of Appeal is the first in the ranking of courts of record that entertain matters relating to Islamic personal law.¹⁵⁵ The court is headed by a Grand Kadi and a number of Kadis as may be prescribed by the State House of Assembly.¹⁵⁶ The

¹⁵² In 2005, this researcher, who was then a Deputy Chief Registrar, was appointed by the then Chief Judge of Borno State in Nigeria, Honourable Justice Ibrahim Garandawa, to investigate and report the problems of the state's courts and staff. The report contained some the enumerated shortcomings.

¹⁵³ Tobi, N. (1996). Op. Cite., 101.

¹⁵⁴ Munir, M. (2008). Precedent in Islamic Law with Special Reference to the Federal Shari'at Courts and the Legal System in Pakistan, V. 47, No. 4, at 445.

¹⁵⁵ Section 275(1) of the 1999 Constitution established the Sharia Court of Appeal

¹⁵⁶ Ibid. Section 275(3).

appointment to the office of the Grand Kadi of the Shari'ah Court of Appeal is made by the Governor on the recommendation of the National Judicial Council subject to confirmation by the House of Assembly of the State.¹⁵⁷ With respect to other Kadis of the Shari'ah Court of Appeal, the appointment is made by the Governor on the recommendation of the National Judicial Council. There is no requirement for confirmation by the State House of Assembly.¹⁵⁸

3.2 The Concept of the Nigerian Legal Pluralism

The pluralist nature of the Nigerian legal system is exemplified by the fact that its legal system has several sources which is strongly due to the nature of its people and their contact with others. Nigeria has over 500 different tribes and languages. These languages and tribes have different cultures, customary laws and ways of life, hence the nation's legal pluralism.

Similarly, the coming of Islam and Christianity has played a significant role in influencing the present day Nigerian legal system with enormous impact on the ways of life of the people. Since Islam is a complete way of life, it did not just provide for the spiritual aspects of the citizenry but for a comprehensive set of laws relating to both spiritual and mundane activities.

To appreciate the influence of the sources of the Nigerian law in making the Nigerian law pluralistic in nature, it is important to examine its sources:

¹⁵⁷ Ibid. Section 276(1).

¹⁵⁸ Ibid. Section 276(2).

3.2.1 Nigerian Legislations

Nigerian legislations are the laws made by the Federal, States and the local government legislatures. These three tiers of government are empowered by law to make laws. There are currently 36 states and 774 local governments in Nigeria.¹⁵⁹

The Federal legislations are termed as Acts of the National Assembly who has the exclusive jurisdiction to make laws on matters spelt out in the exclusive legislative list.¹⁶⁰ The National Assembly comprises of the Senate and House of Representatives. The Senate is the Upper house consisting of 109 elected members, 3 from each state of the federation and one from the Federal Capital Territory Abuja.¹⁶¹ The Senate President is the leader of the Senators, he and his Deputy are elected by them.¹⁶² The House of Representatives, headed by the Speaker, is the Lower House of the National Assembly with 360 Honourable members from all the States of the Federation.¹⁶³ Both chambers are elected for a four year term.¹⁶⁴ Whenever there is any conflict between a Federal law and a state law, the Federal law shall prevail and the State law shall be void to the extent of its inconsistency.¹⁶⁵

Nigeria has had over 20 years of military rule and all the laws made by the military administration at the federal level are termed Decrees. It is the practice of the military in Nigeria to suspend the Constitution whenever they takeover government and promulgate a new one when they want to hand over government to a civilian government.¹⁶⁶ There is no doubt that the military in Nigeria has significantly influenced and reshaped the present day Nigerian legal system. Since the military is not bound by any procedural bottlenecks

¹⁵⁹ Section 3(6).

¹⁶⁰ Ibid. Section 6.

¹⁶¹ Ibid. Section 48.

¹⁶² Ibid. Section 5(1)(a).

¹⁶³ Ibid. Section 49.

¹⁶⁴ Ibid. Section 5(1)(b).

¹⁶⁵ Ibid. Section 4(5).

¹⁶⁶ Asien, J. O. (2005) *Introduction to Nigerian Legal System*. Nigeria: Ababa Press Ltd., 8.

or technicalities in their law making process, they simply pass laws and ensure their enforcement.¹⁶⁷ The Nigerian constitution has acknowledged all the laws made by the military as part and parcel of the present day Nigeria law so long as it does not contravene the provision of the Constitution. Since Nigeria is now under a democratic rule, the laws made by the military will not be named as Decrees but as Act as if it was made by the National Assembly.¹⁶⁸

A major problem with the military rule in Nigeria is human right abuses. It arrogated to itself both executive and legislative powers and as such the abuse of power was the order of the day.¹⁶⁹ In fact, even the courts have no jurisdiction to challenge the validity or otherwise of the laws made by the military administration. That means even if a law appears to be oppressive, absurd or repugnant to national justice, equity and good conscience, no court in Nigeria can challenge its validity.¹⁷⁰ These and other factors make the military administration abhorrent and unacceptable in present day Nigeria.¹⁷¹

Interestingly, the Federal government of Nigeria has commendably tried to put together all the Federal laws in Nigeria into a single document known as the Laws of the Federation of Nigeria (LFN). It was initially published in a series of 24 volumes in 1990.¹⁷² It was further revised in 2004 in a 16 volume document containing all Acts and subsidiary legislations that were in force on 31st December, 2002.¹⁷³ The importance of this move in making research and reference easier to judges, lawyer, academicians, need not be over

¹⁶⁷ Ibid.

¹⁶⁸ Section 315 CFRN 1999.

¹⁶⁹ Asien, J. O., *Op Cite*, 10.

¹⁷⁰ Federal Military Government (Supremacy and Enforcement) of Powers Decree No. 12 of 1994 and Constitution (Suspension and Modification) Decree No. 107.

¹⁷¹ Asien, J. O., *Op. Cite*, 10.

¹⁷² Referred to as Laws of the Federation of Nigeria, 1990.

¹⁷³ Referred to as Laws of the Federation of Nigeria, 2004.

emphasized. This is because since it is arranged in alphabetic order, it will be very easy for any reference and consultation purpose.

Similarly, the State Houses of Assembly have jurisdiction to make laws on matters in the concurrent legislation list. They are empowered by the constitution to make laws for the good governance of their states. They are comprised of a member from each local government of the state. That means the number of local governments in a state determines the number of its members. It is headed by the Speaker and his Deputy Speaker who presides over the house in the absence of the Speaker. They are both elected by the members of the house. The laws made by the House of Assembly are termed as 'Law'; which is referred to as 'Edict' in military dispensation.

3.2.2 Case Law

Case law, being the interpretation of legislations by the courts, serves as an important source of the Nigerian law.¹⁷⁴ Nigeria operates the common law system which it inherited from its British colonizers. Under this system, the decisions of court serve as a subsidiary source of law.¹⁷⁵ The Nigerian constitution is very clear to the effect that the responsibility of the court is to interpret the laws made by the legislature. However, where issues are presented by the court and the court has not found any law to comprehensively govern that issue, the court is not expected to remain helpless but make decisions that are just and equitable. Similarly, lower courts are bound by the decisions of the higher courts and that establishes precedence that must be followed just like laws hence serving as case law.¹⁷⁶

Under the Nigerian setting, there are courts of record and courts that are other than the courts of record. The courts of record are those courts that are specifically mentioned in

¹⁷⁴ Delegated legislation equally serves as a form of secondary legislation.

¹⁷⁵ Nwabueze, R.N. (2002). The Dynamics and Genius of Nigeria's Indigenous Legal Order *Indigenous Law Journal*, Vol. 1, 155.

¹⁷⁶ Ibid

the constitution while courts that are not courts of record are those that are not mentioned in the constitution. The decisions of the courts of record are binding on all other courts in Nigeria. According to the Constitution, the Supreme Court is the highest court and its decision is binding on all other courts in the country.¹⁷⁷ The Court of Appeal is next to the Supreme with its decision binding on all other courts in the country.¹⁷⁸ The Federal High Court¹⁷⁹, State High Court¹⁸⁰, Shari'ah Court of Appeal¹⁸¹ and the Customary Court of Appeal come next to the Court of Appeal.¹⁸² IBF litigations are handled by the High Courts without any limitations unlike in Malaysia. In the early years of Islamic banking in Malaysia the Civil Court had some limitations in adjudicating Islamic banking cases.¹⁸³ This issue has been raised in the Malaysian case of *Affin Bank* which suggests the existing legal framework of implementation and enforcement of the Islamic banking documents in Malaysia is inadequate.¹⁸⁴ This has been discussed in detail in chapter 5.

3.2.3 Islamic Law

Islamic law, also called Shari'ah, is the law of Allah that is designed to govern the relationship between a Muslim and his creator (ibadat) and relationship of a Muslim with other creatures (*Muamalat*).¹⁸⁵ Islamic law has the Qur'an¹⁸⁶ and Sunnah¹⁸⁷ as its primary

¹⁷⁷ Section 231 CFRN 1999.

¹⁷⁸ Ibid. Section 240.

¹⁷⁹ Ibid. Section 249.

¹⁸⁰ Ibid. Section 270; The National Industrial Court was also established under Section 254C of the CFRN 1999 Third Alteration Act, 2011.

¹⁸¹ Section 275 CFRN 1999.

¹⁸² Ibid. Section 280.

¹⁸³ M. Illiyas, (1995). Islamic/Interest-Free Banking in Malaysia: Some Legal Considerations, *Malayan Law Journal*, cxlix-clxiv.

¹⁸⁴ Buang, A. H. (2007). Op. Cite., 322.

¹⁸⁵ Mohammed, U. S. (2008). Islamic Concept of the International Law (The *Siyar*) *Ahmadu Bello University Law Journal (ABULJ)* Vol. 27-28, 48.

¹⁸⁶ The Qur'an is the word of Allah revealed to the prophet (PBUH) through Angel Jibril (AS) that serves as code of guidance to the path of Allah. It is the first primary source of the Shariah.

¹⁸⁷ This consists of the sayings, actions and tacit approvals of the Prophet (PBUH) it is the second primary source of the Shariah.

source¹⁸⁸ while *Ijma*¹⁸⁹ and *Qiyas*¹⁹⁰ are the secondary sources. *Istihsan, Istislah, Masali al Mursala, Urf* or *Adat* (customary law) make up the secondary sources of Islamic law.¹⁹¹

Islamic law is one of the sources of Nigerian Legal system. The Nigerian constitution has recognized Shari'ah Court of Appeal as one of the courts of record. The fact that the Shari'ah Court of Appeal has jurisdiction on matters of Islamic personal law is a clear indication that the constitution recognized Islamic personal law. However, the existence of Shari'ah Court of Appeal is not in all the states of the federation because the constitution states that there shall be a Shari'ah Court of Appeal for any state that needs it. That therefore made states in the country that have only a significant Muslim population especially in the Northern part of the country to create the Shari'ah Court of Appeal in their various states. However, there is the need for the Shari'ah Court of Appeal in all the states of the Federation because denying Muslims the right to use the Shari'ah courts is tantamount to denial of their right to religion as guaranteed in the constitution. The constitution states

“(1): Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

¹⁸⁸ Doi, A.I., (2007). *Sharia: The Islamic Law*. Kano: Al-Yassar Publishers, 21-58.

¹⁸⁹ *Ijma* is the consensus opinion of Muslim Jurists

¹⁹⁰ This means analogical deduction of a Muslim jurist based on the Qur'an and Sunnah

¹⁹¹ Doi, Op. Cit., 64-85 See also Kamali, H., (2000) *Law and Society: The Interplay of Revelation and Reason in the Sharia*, UK: Oxford University Press,, 100.

(2): No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance related to a religion other than his own, or a religion not approved by his parent or guardian.

(3): No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.”¹⁹²

An issue that has not fully addressed in Nigeria is the issue of whether Islamic law is the same as customary law.¹⁹³ The Native Court Ordinance clearly stated that Islamic law is the same as custody law. The implication of this provision is that Islamic law will be subjected the validity tests before it becomes applicable. Hence a court can simply say that a particular principle of Islamic law will not be applicable because it is repugnant to natural justice, equity and good conscience. Justice Wali Bello in *Alkamawa V Bello*¹⁹⁴ clearly debunked this position and described it as erroneous stated that Islamic law is not the same as customary law for it does not belong to any particular tribe, it more rigid and universal than even the English law. Niki Tobi, JSC equally mentioned in his book that the place of Islamic law in the development of Nigerian legal System cannot be over emphasized. Islamic law has a separate and distinct identity from customary law. To equate Islamic law with customary law or to give the impression that Islamic law is either an offshoot of or appendage of customary law is to say the least an ignorant assumption or conclusion.¹⁹⁵

¹⁹² Article 35 CFRN 1999

¹⁹³ Section 2 of the Native Courts Ordinance 1914 provided that “Native law and custom includes Islamic law.”

¹⁹⁴ (1998) 8 NWLR (pt 561) 173.

¹⁹⁵ Tobi, N., *Op. Cite.*, 151.

In addition to the courts observation, an objective analysis of the features of Islamic law and customary law is enough to reveal the fact that the two are not the same.¹⁹⁶ One of the features of customary law is that it originates from the long practice of the people but Islamic law originates from Allah, the lord of mankind. The Qur'an speaks:

“And we have made for you a law so follow it and not the fancies of those who have no knowledge.”(Qur'an, Jathiya: 18).

In his tafseer of this verse, Imam Tabari observed that the Shari'ah in the verse means the path or law of Allah which he has put in place for generations that came even before us.¹⁹⁷

Another area of difference is that customary law's feature is that it applies to a particular group of people, meaning each community has its custom which is distinct from that of other community. On the contrary, Islamic law is universal in nature. The Qur'an provides

“We have not sent you but to the whole of mankind”¹⁹⁸ (Qur'an, Saba'i:28).

Imam Ibn Kathir observed that this verse has shown that the message of the prophet (Islamic law) is a universal message.¹⁹⁹ The Qur'an states further:

“Say, [O Muhammad], "O mankind, indeed I am the Messenger of Allah to you all, [from Him] to whom belongs the dominion of the heavens and the earth. There is no deity except Him; He gives life and causes death. So believe in Allah and His Messenger, the unlettered prophet, who believes in Allah and His words, and follow him that you may be guided.”²⁰⁰ (Qur'an, al-A'araf:158)

¹⁹⁶ Alkali, A.U., et al. (2014). Nature and Sources of Nigerian Legal System: An Exorcism of a Wrong Notion, *International Journal of Business, Economics and Law*, Vol. 5, 4, 8.

¹⁹⁷ Tabri, M. J., (2000). *Jamiu al-Bayan Fii Ta'wiil al-Qur'an*, Vol. 22. KSA: Muassisat al-Risala, 70.

¹⁹⁸ Qur'an, Saba'i:28.

¹⁹⁹ Ibn Kathir, I., (1999). *Tafsir al-Qur'an al-Azim*, Vol. 6, (KSA: Dar al-Tabi li al-Nazri wa al-Tawzi'I, 518.

²⁰⁰ Qur'an, al-A'araf:158. See also Qur'an, Furqan:1

This has clearly shown that they do not agree with respect to the issue of universality since Islamic law is universal while customary law is restricted to the community in question.

Similarly, a feature of customary law is that it is flexible in nature but Islamic law though elastic and has the potential of addressing contemporary and emerging issues; it cannot be described as elastic in nature. The fact that the revelation of the Qur'an has been completed and no person is allowed to make any changes to the Qur'an or traditions of the Prophet (PBUH) is a pointer to the fact that Islamic law is not flexible hence contrary to customary law and as such not the same.²⁰¹ The Qur'an confirms:

“...This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion...” (Qur'an, al-Maida: 3)

The discussion has made clear the fact that the argument that Islamic law and customary law are the same needs to be put to rest by making it very clear that Islamic law is not the same as customary law.

An area that has remained very challenging with respect to the application of Islamic law in Nigeria is the issue of Islamic criminal law. Many states in northern Nigeria promulgated the Shari'ah Penal Code when Nigeria returned to a civilian rule in 1999.²⁰² Zamfara state under Senator Ahmad Sani was the first to state the implementation of the Shari'ah Penal code. This was not welcome by the Christian Association of Nigeria which felt it was an attempt to Islamize Nigeria. The result of this disagreement was violent protests that resulted in the death of thousands and destruction of property worth millions of naira.²⁰³

The implementation of Islamic criminal law has now died a natural death due to lack of

²⁰¹ Doi I.A., (1984). *Sharia the Islamic Law*. London: Taha Publishers, 27.

²⁰² Okpanachi, E., (2011), *Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi States* Vol. 25, *Emory International Law Review*, 897.

²⁰³ Ibid

seriousness from the leaders and pressure from home and abroad against its implementation.

2.2.4 Customary Law

Customary law is one of the sources of Islamic law. It cuts across various part of the country except in parts of northern Nigeria where Islamic law is strong and is used to apply on Muslims.²⁰⁴ Customary law is very important because it guides the courts in solving practical questions such as those related to moral principles.²⁰⁵ Customary laws are used in the solving both private and public disputes both before and after the advent of colonial administration in Nigeria. It remained an indispensable part of the Nigerian legal system even after independence.²⁰⁶

Customary law is a law that is derived from the customs and traditions of the people. As to what is a custom, various definitions of custom is provided by the laws, courts and writers. The Evidence Act defined custom as “a rule which in a particular district, has from long usage, obtained the force of law.”²⁰⁷ Obaseki JSC observed in *Oyewunmi Ajagunbade III V Ogunesan*, thus:

“(Customary law is) the organic and living law of all indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people.”²⁰⁸

²⁰⁴ Yakubu, A., (1999). *Harmonization of Laws in Africa*, Lagos: Malthouse Press Ltd, 25.

²⁰⁵ Saussine, A.P. & Bernard, J., (2007). *The Character of Customary Law: Legal, Historical and Philosophical Perspectives*. USA: Cambridge University Press,, 1.

²⁰⁶ Ibid

²⁰⁷ Onokah, M.C. (2003). *Family Law*. Nigeria: Spectrum Law Series. 69.

²⁰⁸ (1990) 3NWLR 182 at 207.

According to Baderman custom can be described as the practices and usages of a given people which are seen as a source of obligation and contemporary legal culture by the people.²⁰⁹

There are certain characteristics which a custom is expected to satisfy before it becomes applicable. Any person that wishes to rely on the existence of a custom to support his argument before the court must show the court that the custom in question has satisfied all the requirements of a valid custom.

Firstly, a claimant must show to the court that the custom he intends to rely upon is a valid and existing custom at the time the issue before the court came up. That means even if the custom is proved to be valid, so long as it was not in existence at the time the issue in question is brought before the court, In *Lewis v Bankole*, Speed Ag said “existing natural law and custom and not that of bygone days.”²¹⁰ The dictum of Speed Ag has clearly shown that it is possible for a custom to vanish and cease to be accepted by the people. In that situation, the court will not accept such a custom as part and parcel of the custom of the people.

A second requirement for the application of a custom is that such a custom must be a custom as well as law at the same time. Sanction is principally the factor that makes the law requirement in the custom very important. This is because laws need to have the element of sanction in case of breach.²¹¹ It is a fact that breaching a custom may attract some form of societal punishment; it lacks that instrumental sanction which is definite and precise.²¹²

²⁰⁹ Baderman, D.J., (2010). *Custom as a Source of Law*. USA: Cambridge University Press,, 9.

²¹⁰ (1908) 1NLR 81.

²¹¹ Tobi, N., Op. Cite. 106.

²¹² Ibid

Thirdly, before a court recognizes a custom, the claimant of its existence must show the court that that particular custom is actually accepted by the people. It is a fact that custom is generally born out of the practice of the people and therefore not codified in a document form. This fact make custom to be unwritten and flexible in nature. A custom practiced a century ago may not be applicable today because with time, circumstances and development, people develop their customs to agree with reality on ground. In *Lewis V Bankole*, Osborn CJ observed that:

“...indeed, one of the most striking features of West African native custom to my mind is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individualistic characteristics.”²¹³

Finally, a custom must be of universal application before it becomes applicable or acceptable by the court. By universal application, it means that particular custom must cut across the particular community in its application and not restricted to a section of that community. However, certain level of local variations may exist to differentiate between different customs depending on the tribe or ethnic group but the form and content may be similar across board.²¹⁴

However, ones a court has already judicially noticed a particular custom as a valid and existing custom in a particular community, there is no need to undergo all the requirements for the applicability of a custom discussed above. According to the Evidence Act, a custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or proved to exist by evidence.²¹⁵ By this provision, a custom can be

²¹³ (1908). 1NLR 81

²¹⁴ Tobi, N. Op. Cit. 110.

²¹⁵ Section 14(1) Evidence Act.

judicially noticed or be proved to exist by evidence through witnesses and texts.²¹⁶ The law has placed the burden of proving the existence of a custom on the person alleging of its existence.

After a customary law has passed through all the requirements for validity, before that custom becomes applicable, it must also pass through certain tests to ensure that its application will not be harmful to the society or to the individuals in question. Before a custom becomes applicable, such custom must not be repugnant to natural justice, equity and good conscience or incompatible directly or by implication with any law.²¹⁷ It must equally not be contrary to public policy.²¹⁸ These validity tests were introduced by the colonial administration to ensure that all those cultures which they felt contrary to their sense of judgement were made inapplicable.²¹⁹ This fact is further buttressed by the fact that there is no standard to measure or determine what all these tests standard for. It is therefore left for the judge to decide based on his personal view.²²⁰ These validity tests have been used to make invalid several cultures.²²¹ It was held, in the case of *Mariyama V Sadiku Ejo*, that a customary law that sets to return a child, born within 10 months after divorce, to the former husband, is repugnant to natural justice and that the child should be given to the new husband, being the natural father.²²²

²¹⁶ Tobi, N. Op. Cit. 130.

²¹⁷ Section 27(1) High Court of Lagos Act.

²¹⁸ Section 14(3) Evidence Act.

²¹⁹ Alkali, A.U., et al. Op. Cit. 7.

²²⁰ Ibid.

²²¹ Onuoha, A., (2008). *Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue*. The International Journal of Not-for-Profit Law Vol. 10, 2, 6.

²²² (1961) NRNLR 81.

3.2.5 Received English Law

This refers to the law received from the British colonialists. This consists of the common law of England, Doctrines of Equity and Statute of General Application in force in England on or before the 1st of January 1900.²²³ The foundation of the Received English law is undoubtedly Christianity.²²⁴ This position is supported by Lord Sumner in *Bowman v Secular Society*:

“Ours is and always has been a Christian state. The English family is built on Christian ideas, and if the national religion is not Christianity there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles with equal justice and equally good government, in heathen communities and its sections even in courts of conscience...”²²⁵

The common law which is one leg of the received English is a law that is common in all the four realms of the United Kingdom comprising of England, Ireland, Scotland and Wales.²²⁶ The common law was developed by the common law courts. The common law is developed by the common law courts made up of the common law courts of Kings Bench, Courts of Common Pleas and Courts of Exchequer. The common law is the oldest of the three pillars of the received English law.²²⁷

Doctrines of equity on the other hand came to cushion the hardship in the common law. The common law works based on writs and each case has a particular writ that covers it. However, whenever there is a new issue that is not covered by a writ, a complainant will

²²³ Obilade, A.O., (1979) *The Nigerian Legal System*. Spectrum Law Publishing, Ibadan. 4.

²²⁴ Imam I., et al, (2010) The unending Crises on the Status of Sharia in Nigeria: A Critical Analysis. *Usman Danfodio University Sokoto Journal of Islamic Comparative Law (UDUSJICL)*, Vol. 2, 116.

²²⁵ (1917) A.C. 406.

²²⁶ Park, A.E.W. (1963). *Sources of Nigerian Law* Lagos: African Universities Press. 6.

²²⁷ Ibid

be left without a remedy. As a result of this restriction, severally wrongs such as breach of trust were left without any form of remedy for the beneficiaries. That resulted in complaints to the king who now appointed the chancellor to address these complaints.²²⁸ The chancellor's justice gradually graduated into the equity courts. The nature of the equity justice system resulted in conflict with common law and the common law judges were unhappy with the equity system. That resulted in serious conflict to the extent that King James II had to intervene. That result of the intervention saw the passing of the Judicature Act of 1873 and 1875 that merged the common law and equity courts and declares that in case of any conflict between the common law and equity, equity shall prevail.²²⁹

Statutes of General Application are the third pillar of the received English law which applies in Nigeria. A statute of General Application constitute of all the laws that were in force in England on or before the 1st day of January 1900.²³⁰ Unlike the other sources of English law, a Statute of General Application does not apply to the old Western Region of Nigeria.²³¹ Before any statute of general application becomes applicable, it must be applicable in England and secondly such application must be before January, 1, 1900. Any statute that falls short of these two important requirements will not apply as a statute of general application. The Court in *Lawal vs. Younan*²³² reaffirmed the decision in *Young vs. Abina* that two important requirements must be fulfilled before a statute of general application becomes applicable, firstly, such statute must be applicable to the whole of the United Kingdom²³³ and secondly it must be applicable on or before 1st January, 1900. In *Young v Abina*,²³⁴ the West African Court of Appeal held that it would still be applicable

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Tobi, N. (1989). Op. Cit.

²³¹ Law of England (Application law), 1959.

²³² (1961) 1 All NLR 245 per Brett J.

²³³ United Kingdom consists of Great Britain and Northern Ireland. Britain comprises of England, Wales and Scotland

²³⁴ (1940) 6 WACA 180.

in Nigeria even if it has been repealed or amended in England after 1st January, 1900. However in *Lawal v Ejidike*²³⁵ the Court of Appeal held that it will be ridiculous for Nigerian Courts to continue to apply a law of England even if that law has ceased to apply in England. Hence a Statute of General Application applies in Nigeria only if it remains a valid and enforceable law in England on the date in question.

The received English law became part and parcel of the Nigeria legal System following the contact of Nigeria with its colonial master (England) after the Berlin Conference.²³⁶ When Britain started occupying the Nigerian territory for the purpose of colonization, it gradually introduced its laws to apply in the territories under its control. Lagos colony was the first part of Nigeria which fell into colonial administration and its laws in Nigeria.²³⁷

After Nigeria became independent in 1960, the received English Law remained part and parcel of the Nigeria laws.²³⁸ The High Court Laws of Eastern,²³⁹ Northern,²⁴⁰ and Western Regions²⁴¹ though promulgated before independence, but continued to apply as the High court laws of the various states of the federation. These High Court laws clearly mentioned that received English law is part and parcel of the laws to be applied by the High Court. Similarly, the Interpretation Act states thus:

“Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1990, shall be in force in Lagos and in so far as they relate

²³⁵ (1997) 2 NWLR 319.

²³⁶ Nwabueze, R.N., (2002). Op. Cit. 155.

²³⁷ Colonial Laws Validity Act 1865, the Crown can legislate by Order-in-Council for any colony, protectorate or trust territory under the colonial Administration.

²³⁸ Nigeria Independence Act, 1960 (8 and 9 EL.2.2, C55).

²³⁹ Sections 14 and 20 of the High Court Law, Eastern Region No. 27 of 1955.

²⁴⁰ Section 28 and 28a of the High Court Law, Northern Region No. 8 1955.

²⁴¹ Section 4 and 5 of the Laws of England (Application) Law, Western Region Cap 60, Laws of Western Region.

to any matter within the exclusive legislative competence of the federal legislature, shall be in force in elsewhere in the Federation.”²⁴²

These laws have shown that the received English law is part of the body of laws that make up the present day Nigerian legal system. The courts have equally added weight to the fact that the received English law is a source of the Nigerian legal system. The apex court in Nigeria held in the case of *Ibidapo v Luthansa Airlines*²⁴³ that the Carriage of Goods by Air (Colonies Protectorates and Trust Territories) Order, 1953 which is a Colonial Legislation was part of the body of Nigerian Law even though it was not later included into the statute titled Laws of the Federation, 1990 since it had not been repealed nor declared invalid by any court of law. This is by virtue of Section 315(1) of the 1999 Constitution dealing with existing laws, which states that all the received English Laws, Multi-Lateral and Bilateral agreements concluded and extended to the Federal Republic of Nigeria shall remain valid and enforced in Nigeria unless expressly repealed or declared invalid by a court of law or tribunal established by law.

However, the Independence Act 1960 has made all the received English Law only of persuasive influence in Nigeria. In *Ibidapo v Luthansa Airline*²⁴⁴ the court stated that the Colonial Laws Validity Act 1865 was abolished by the Independence Act 1960 hence Received English law is now only of persuasive influence in Nigeria and not binding in Nigeria except where it has been expressly passed into law in the country.

It is worthy to mention that though the received English law is only of persuasive influence, most of the present day Nigerian laws are products of the colonial administration. Some were adopted with little amendments while others remain completely unchanged. For example, *inter alia*, the Evidence Act, High Court Laws, Penal Code of

²⁴² Section 45 of the Interpretation Act.

²⁴³ (1997) 4 NWLR 124.

²⁴⁴ (1997) 4 NWLR 124.

Northern Nigeria and the Criminal Code of Southern Nigeria are all products of the colonial administration.

3.3 The Operation of IBF

Since IBF is principally based on Islamic law, it is important to start by saying that Islamic law by definition and concept is the natural order established by Allah for mankind to achieve balance, justice and equity not only for men but also for all things created by Allah, material and non-material.²⁴⁵ It is a whole system that does not give room for selective appreciation of nature.²⁴⁶ The Qur'an states:

“We have made for you a law (Shari'ah) so follow it and not the fancies of those who have no knowledge.”²⁴⁷(Qur'an 45:18).

The aim of Shari'ah is to use truth in arriving at justice through the progressive use of the rules and principles of adjudication.²⁴⁸ Shari'ah conceives the human life in its totality and as such gives guidance in all aspects of human endeavor so as to enhance worship. Shari'ah is therefore more of a code of religious duties in every aspect of private and public field which guaranteed its authority and the unity of Muslims despite their great diversity.²⁴⁹

The emergence of IBF is not unconnected with Islamic revival that is witnessed in the last part of the last century.²⁵⁰ The clamour by Muslims to have every part of their lives governed by the perfect laws of Allah is directly connected with the unprecedented growth

²⁴⁵ Imam I., et al, Op. Ct. 116.

²⁴⁶ Ibid.

²⁴⁷ Qur'an 45:18.

²⁴⁸ Gafai I.A., (2010). Comparative Analysis of the Rights of Women in Sharia and Common Law in Contemporary Nigeria. *Journal of Islamic science and Contemporary Development, Series 2*, 30.

²⁴⁹ Madupe A.N. et al, (2012) The Economic Right of Women under Islamic Law: The Obstacles and Challenges in Contemporary Nigeria. *Human Rights Review* Vol. 3, 120.

²⁵⁰ Aziz, M.R. (2013). *Islamic Banking and Finance in Malaysia: System, Issues and Challenges*. Selangor: USIM publisher. 11.

and success of the system across the globe.²⁵¹ This is portrayed by Alhaj Bunu Monguno when he made the following statements during my interview with him by proxy:

“My community, and indeed the Nigerian community, is predominantly Muslim. The level of acceptance is encouraging. We are clamouring for the Islamic economic system, especially banking and finance, to govern our affairs as part of our *Ibada*, worship. After all it will pose as a challenge to the conventional Banks to perform better which is good for the society. Although we have the Jaiz bank in Nigeria, we need more and should also improve on the existing windows in other banks because the court decision against Jaiz bank is scaring us.”²⁵²

He further suggested that:

“Malaysian laws should guide us because of their experience in the field. IBF is our constitutional right to worship because both Islam and Christianity prohibit usury and all forms of harm to individuals and societies. I appeal to the executive for political will, appeal to the legislature to amend, enact or scrap laws whenever necessary to enhance the IBF system in Nigeria.”²⁵³

Principally, IBF operates on a profit and loss sharing bases as against the interest based form of conventional banking. It can be described as type of banking and finance activity that is consistent with the principles of the Shari’ah and governed by the law of Allah the Most High.²⁵⁴ It calls for the redistribution of resources and stands against oppression and

²⁵¹ Ibid

²⁵² Alhaji Bunu Monguno is a Senior Civil Servant and Community leader. He is the Chairman of the Dalori Quarters Community and a State Government Director in Maiduguri, Borno State, Nigeria. (28th August, 2013, Maiduguri, Borno State, Nigeria)

²⁵³ Ibid.

²⁵⁴ Aziz, M.R Op. cit.

all forms of illegalities.²⁵⁵The prohibition of usury is evident in a number of authorities from the Qur'an and Sunnah. Allah says:

“O you who belief, Eat not up your property among your selves unjustly except it is by trade amongst you or by mutual consent...”²⁵⁶ (Qur'an 4:29)

Allah says further:

“And those who eat Riba will not stand (on the day of resurrection) except like the standing of a person beaten by Satan leading him to insanity. That is because they say: Trading is only like Riba (usury). Whereas Allah has permitted trading and forbidden Riba (usury) whosoever receives the admonition from his Lord and stops eating Riba shall not be punished for the past.”²⁵⁷(Qur'an 2:275).

The prophet (PBUH) was equally reported to have said that Allah has cursed the person who devours usury, its payer, its scribe and its two witnesses are all equal in sin.²⁵⁸

Quran, the grand norm of Islamic law, has the following probation for documentation in all future transactions including IBF. The verse is the longest in the Qur'an:

“O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the

²⁵⁵ K.haf, M. (1996). Profit Distribution in Islamic Banks. *Review of Islamic Economic Studies* Vol.3 No.2, 130.

²⁵⁶ Qur'an 4:29.

²⁵⁷ Qur'an 2:275.

²⁵⁸ *Sunan of Abu-Dawood* Hadith 3327 in yet another Hadith, *Sahih Al-Bukhari* Hadith 8.840 Narrated by Abu Hurairah the Prophet said, "Avoid the seven great destructive sins." They (the people) asked, "O Allah's Apostle! What are they?" He said, "To join partners in worship with Allah; to practice sorcery; to kill the life which Allah has forbidden except for a just cause (according to Islamic law); to eat up usury (Riba), to eat up the property of an orphan; to give one's back to the enemy and fleeing from the battlefield at the time of fighting and to accuse chaste women who never even think of anything touching chastity and are good believers."

scribe refuse to write as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear Allah, his Lord Allah and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves; but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But, take witnesses whenever ye make a commercial contract; and let neither the scribe nor the witness suffer harm. If ye do (such harm) it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things.” (Qur’an al-Bakarah 2:282).

The above verse is the foundation of documentations in the Shar’iah.

Siddiqi opined that generally, Muslims think that *riba* (which they generally and correctly thought included bank interest) makes the banking and financial system unfair and incapable of ensuring the best interests of people. Islamic economists, as well as Muslim scholars in general, did their best in trying to establish this point in the third quarter of the last century and onwards. The same period witnessed two developments that many perceive to be in opposite directions. Firstly, the world, especially the advanced industrial countries, enjoyed phenomenal growth in wealth and, to a great extent, in welfare too. Banking and finance are rightly seen to be a contributing factor. Secondly, dissatisfaction

with the conventional system continued to grow as many saw it as one of the causes of increasing inequality in the distribution of income and wealth within nations as well as between nations of the world.²⁵⁹

The system does not indulge in any form of business that contains *Riba*. This is because it is *haram* (prohibited) under Islamic law and its prohibition under Islamic law is predicated on the fact that it amounts to cheating and oppression of the weak person.²⁶⁰ In addition to the prohibition of *Riba*, Islamic banking only acts in accordance with Islamic principles. Islamic banking does not invest in businesses dealing in alcohol, drugs and gambling, which are considered unlawful or undesirable under the Shari'ah. Since Islamic banking does not indulge in *Riba* and other un-Islamic business transactions, it has to think of options and other ways of indulging in business that can earn them profit and that is the best way for the banks to survive the competition and reality in the banking business.²⁶¹ Happily, IBF institutions are favourably coping and indeed making a lot of gain and popularity in its dealings. This is positive and highly commendable.²⁶² This is informed by the fact that Islamic banking does not just act to satisfy religious obligation of providing Islamic alternative to Muslims but also a formidable business venture that is open to people of all faiths to embrace.²⁶³

However, there are some contemporary Muslim jurists that consider themselves modernist and try to give modern interpretation to long established and settled Islamic

²⁵⁹ Siddiqi, N., (2006). *Islamic Banking and Finance in Theory and Practice: A Survey of State of the Art*, (2006), Vol. 13, No. 2, Islamic Economic Studies. 4.

²⁶⁰ Obiyo, O.C., (2008). Islamic financing/banking in the Nigerian economy: Is it workable? A review of related issues and prospects. *International Journal of Islamic and Middle Eastern Finance and Management*, Vol. 1 Iss: 3, 227.

²⁶¹ Haron, H., and Azmi, W.N.W., (2005). Marketing Strategies of Islamic Banks: A Lesson From Malaysia, paper was presented at the International Seminar on Enhancing Competitive Advantage on Islamic Financial Institutions, Jakarta, 7-8 May.

²⁶² Andrews, M., *Islamic Finance: An Introduction*, (UK: Risk Reward Ltd UK, 2009), P2.

²⁶³ Thambiah, S., et al, (2010). Conceptual Framework for the Adoption of Islamic Retail Banking Services in Malaysia. *Journal of Electronic Banking Systems*, Vol. 2010, 59

principle.²⁶⁴ In their attempt to do that they even argued that the present day interest charged by banks on the customers does not amount to *riba* which is prohibited by the Qur'an and Sunnah.²⁶⁵

Banks can impose interest on their clients by virtue of the principle of '*maslahah al 'ammah*,' or public interest. This is because this principle accommodates the development and commercial needs of the community. However, the need must be real and sufficiently pressing for the community to justify its implementation and there should be no other means to avoid the same. In supporting their argument, they relied on the Qur'anic verse which states that:

“Allah intends every facility for you. He does not want to put you in difficulties.”
(Qur'an, al-Baqarah: 185).

An argument that may sound convincing is to try to justify interest on a person that is forced by a pressing need to seek for the interest. This is in view of the fact that under the Shari'ah, Allah does not punish a servant that is compelled by circumstances beyond his control to indulge in any unlawful thing. The Qur'an has clearly shown that a believer will not be punished by Allah over what he is compelled to say or do. During the time of the Prophet (PBUH) a companion Ammar ibn Yasir was compelled by the *Quraysh* to utter some abusive words on the Prophet and threatened to kill him if he does not do it. As a result of which he did it and he came to the Prophet (PBU) crying that he uttered those ugly words out of duress.²⁶⁶ Allah then revealed:

“Whoever disbelieves in [i.e., denies] Allah after his belief except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who

²⁶⁴ For example Dr/Shiekh Ahmad Gumi of Nigeria.

²⁶⁵ Azahari, F., (2009). Islamic Banking: Perspectives on Recent Case Development, 1 Malaysian Law Journal (MLJ), 120.

²⁶⁶ Tabary, M., (2010). *Jamiu al-Bayan Fii Ta'wil al-Qur'an*, vol. 17, KSA: Maassisat al-Risalah, 305.

[willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment.”(Qur’an, Nahl, 16:106).

Imam Tabary opined that this verse has clearly indicated that a person that is compelled factors beyond his control to do any wrongful act will not be punished by the Shari’ah for that act.²⁶⁷ In yet another verse Allah declared:

“Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah, and [those animals] killed by strangling or by a violent blow or by a head-long fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death], and those which are sacrificed on stone altars, and [prohibited is] that you seek decision through divining arrows. That is grave disobedience. This day those who disbelieve have despaired of [defeating] your religion; so fear them not, but fear Me. This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion. But whoever is forced by severe hunger with no inclination to sin then indeed, Allah is Forgiving and Merciful.”(Qur’an, Maidah: 3).

Imam Bagwi stated in his tasfeer that Allah is very compassionate and merciful to his servant, though Allah mentioned list of things that are prohibited for a believer, however, the Qur’an mentioned that despite the prohibition, if a believer is compelled by necessity such as life threatening hunger and he does not intend sin or go against what Allah has decreed, he is allowed to use any of the prohibited things pending the time he will get the lawful one.²⁶⁸

²⁶⁷ Tabary, M., (2010). Op. Cit.

²⁶⁸ Bagwy, H., (1997). *Tafseer al-Bagwy*, vol. 2, (KSA: Dar al-Tabi’iyah, 1997), 12.

The Qur'an elaborates further:

"I do not find within that which was revealed to me [anything] forbidden to one who would eat it unless it be a dead animal or blood spilled out or the flesh of swine – for indeed, it is impure – or it be [that slaughtered in] disobedience, dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], then indeed, your Lord is Forgiving and Merciful." (Qur'an, al-An'am:148)

In a tradition, the messenger of Allah (PBUH) stated that Allah has forgiven my Ummah with respect to three things, mistake; forgetfulness and that which they are compelled to do.²⁶⁹ In view of all the authorities, could it be said that a person compelled by the pressure of contemporary reality permitted to take bank loan? In the Words of sheikh Alfa:

“Allah has provided for things that are halal and things that are haram for us. Though between these issues there are things that are not too clear, as the Prophet (PBUH) mentioned, believers are always asked to avoid all those things that are in doubt, any believer that stays away from things in which he is doubtful has saved himself from falling into the trap of shaytan. For the avoidance of doubt, the Qur'an and Sunnah have categorically *haram* (prohibited) *riba* and no amount of decoration can make what Allah has made *haram* change to *halal* (lawful). It is therefore a very wrong thinking to claim that the present day *riba* can be lawful due to financial pressure. If a person believes in Allah and relies on him, Allah will open other windows for him.”²⁷⁰

²⁶⁹ Ibn Majah, hadith 2043.

²⁷⁰ Interview with Shiekh Muhammad Salis Alfa, A chief Imam in Kogi State, Nigeria. Interview held on 15th January, 2015.

A point that comes to mind whenever Islamic banking is mentioned is the prohibition of *riba* in its business. But in actual sense, Islamic banking goes beyond just the prohibition of *riba* but also all acts that are prohibited under Islamic. For example gambling is prohibited under Islamic law and as such all transactions involving gambling or uncertainty must be avoided by Islamic banks. The wordings of the Qur'an is very clear on the prohibition of gambling thus

“O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?”(Qur'an Maaida: 90-91).

Ibn Kathir pointed out that this verse has clearly and unequivocally made the position of the Shari'ah clear to the effect that gambling is prohibited under the law of Allah and believers must avoid it.²⁷¹ All business transactions that has elements of uncertainty (*gharar*) falls under the same category with gambling and as such Muslims are not allowed to partake in such kinds of transactions. The Messenger of Allah has clearly mentioned in a hadith reported on the authority of Abdullah Ibn Yufus that business transactions with *gharar* (uncertainties) are prohibited and as such must be avoided.²⁷²

Similarly, IB must avoid business transactions that involves in the sale of wine and all other intoxicant substance. This is predicated on the fact that under Islamic law, intoxicants are haram and Muslims are not allowed to partake in anything that involves or has to do with intoxicants.²⁷³ Wine taking was a serious uprooted culture and practice of the pre-

²⁷¹ Ibn Kathir, I., (1999). *Tasfir Qur'an al-Azim*, vol. 3, KSA: daru Tayyibatu Linashri wal Tawzi, 178.

²⁷² Bukhari, Hadith no. 2143.

²⁷³ Bambale, Y.Y., (2007). Op. Cit., 115.

Islam Arabs, to that extent, Allah adopted a gradual and step by step approach in its prohibition of intoxicant.²⁷⁴ The first stage of the probation started with addressing a question asked by Sayyidina Umar on the legality or otherwise of intoxicants.²⁷⁵ The Qur'an replies

“They ask you about wine and gambling. Say, "In them is great sin and [yet, some] benefit for people. But their sin is greater than their benefit." And they ask you what they should spend. Say, "The excess [beyond needs]." Thus Allah makes clear to you the verses [of revelation] that you might give thought.” (Qur'an, Baqarah, 2:219)

Though this verse stated that the harm in intoxicant is greater than its benefit, it did not expressly prohibit the taking of intoxicant.²⁷⁶ Even after the revelation of this verse, some companions continued to take intoxicant. Until when some companions took intoxicant and it was prayer time. He asked one of them to lead prayer. During the prayer, due to the intoxicant he misplaced some verses of the Qur'an and changed the message Allah sent in those verse. That became a matter of concern and Sayyidina Umar asked the messenger of Allah to further ask Allah for another pronouncement on intoxicant. Then Allah revealed,

“O you who have believed, do not approach prayer while you are intoxicated until you know what you are saying or in a state of janabah, except those passing through [a place of prayer], until you have washed [your whole body]. And if you are ill or on a journey or one of you comes from the place of relieving himself or you have contacted women [i.e., had sexual intercourse] and find no water, then seek clean earth and wipe over your

²⁷⁴ Jawad Ali, (2001). *Al-Mufassall fii tariikk al-AArab Qabla al-Islam* Vol. 1, 4th ed., Madinah: Daru al-Saqa, 112.

²⁷⁵ Al-Qaradawi, Y., (1995). *The Lawful and Prohibited in Islam, (al-halal wal Haram Fi al-islam)*, translated into English by El-helbawy, et al, Kuala Lumpur: Islamic Book Trust, 1995, 200.

²⁷⁶ Ali, A.Y., (1934). *The Holy Qur'an*. Damascus: Dar Al-Arabia, 284.

faces and your hands [with it]. Indeed, Allah is ever Pardoning and Forgiving.” (Qur’an: Nisa; 4:43)

After this revelation, most companions avoided intoxicant, however some continued to take it but usually at night so that before the morning prayer, they will be sober hence not violating the Qur’anic injunction asking for prayer while in a state of soberness. Lastly, after taking wine, some companions got intoxicated and had a fight resulting in injuries, hence Allah finally revealed the verse that prohibited the taking of intoxicants in Islam, thus:

“O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?” (Qur’an Maaida: 90-91).

This discussion has therefore made clear the fact that Islamic banking are required not only to avoid *riba* (usury) but also all forms of business transaction that involves things that are prohibited under the Shari’ah such as gambling, uncertainty and intoxicant.

3.4 History of IBF in Nigeria

In the pre-colonial Sokoto caliphate of Nigeria, which presently consists of more than half of the present day Northern Nigeria, various forms of money lending were present in 1903.²⁷⁷

A case was reported of a successful Hausa businessman in the 1930-40s, Alhaji Al Hasan, who used to find outlets for surplus capital. He advanced money to the young men of sound

²⁷⁷ Abikan, A.I., (2009). Op. Cite., 96.

business acumen requiring them to pay him half of their business profit, or less at times, if no profit was made. When he eventually banked with conventional banks, he was reported to have refused interest for religious reasons though he accepted good customer gifts at the end of the year.²⁷⁸

In 1894 the Bank of British West Africa (BBWA) was established. It was later known as Standard Bank and presently known as First Bank of Nigeria.²⁷⁹ The Bank of Nigeria initially called The Anglo African Bank was established in 1899 (also called Bank of British West Africa).²⁸⁰

In 1952, the first Banking Ordinance was promulgated which saw the result of protest by nationalist that the banking industry is dominated by foreigners. The Central Bank of Nigeria Ordinance and Banking Act of 1958 also saw the light of the day. The Central Bank of Nigeria Decree No. 24 of 1991 and the Bank and other Financial Institution Decree No. 25 were enacted in 1991. The thrust of these laws was to control the new banks and other financial institutions emerging as a result of the 1987 financial liberalization and deregulation.²⁸¹

No mention was made of IB until the coming into force of the Banks and other Financial Institutions Decree No. 25 following pressing demand by Muslims to have banks that comply with the principles of Shari'ah. Habib Bank attempted to open a window of non interest banking but that commendable effort fell short of achieving the expected result. The Central Bank has issued license to Jaiz Bank²⁸² which is out to operate Shari'ah

²⁷⁸ Ibid

²⁷⁹ Official Web-site of First Bank: <http://www.firstbanknigeria.com/about-us/about-us/> Retrieved August 17, 2015.

²⁸⁰ http://en.wikipedia.org/wiki/Bank_of_British_West_Africa Retrieved August 11, 2015

²⁸¹ Abikan, A.I., Op. Cite, 96.

²⁸² Official Web-site of Jaiz Bank: [http://jaizbankplc.com/about-us.aspx\(visited](http://jaizbankplc.com/about-us.aspx(visited) Retrieved May 1, 2013.

compliant banking business. It is hoped that with the unprecedented patronage and support the new Jaiz Bank is enjoying as attested to by the CBN governor²⁸³, it is here to stay.

The Stanbic Bank in Nigeria operates an Islamic finance window but is not a fully-fledged I.B. The CBN is also considering an application by Standard Chartered Bank and a few other banks to establish an Islamic Finance window.²⁸⁴ A. S. Orisankoko summarized the historic and contemporary status of IBF in Nigeria in following words:

“Usually, most indigenous authors, academia and scholars have continuously reviewed the historical background of Islamic/Non-Interest Banking in Nigeria and majority seem to center their focus on the defunct Habib Nigeria Bank Ltd as the first Islamic variant-banking model to have opened a window for Non-Interest banking while Jaiz International PLC is regarded the nip-board of the full-fledged Islamic Bank in Nigeria. Al-Baraka Micro Finance is taken for the pioneer Islamic Micro-finance while Lotus Capital Investment Limited is regarded as the primal Islamic Finance and investment institution in Nigeria”²⁸⁵

It is believed that at present there are about 500 Islamic banks worldwide controlling assets that are worth about US \$1 trillion. The figure, according to analysts, could rise to about US \$4trillion by 2020. With the economic viability and the legal compatibility of NIB proven beyond any reasonable doubt, it would amount to gross injustice to deny citizens

²⁸³ Sanusi, L. S. (2011) Op. Cite. 6-7

²⁸⁴ Eboh, M. (2011). Nigeria: CBN Grants Islamic Banking Licence to Stanbic IBTC. *Vanguard News Paper* of 5th July, 2011 See interview with Babaye Saidu, Manager of Stanbic Bank Islamic Banking window at Appendix B.

²⁸⁵ Orisankoko, A.S. (2012). Socio-Economic and Legal Challenges of Sharia-Compliant Banking Operation, its Developmental Impacts and the Struggles of the Believers: Epistemological Lessons from Nigeria. *Journal of Islamic Economics, Banking and Finance*, Vol. 8 46 No. 2, 49.

of Nigeria the right to enjoy the benefit of the IBF as enjoyed by their counterparts in many countries of the world today.²⁸⁶

3.5 Legal Frameworks of IBF in Nigeria

There is no special and separate law for IBF in Nigeria like the Financial Services Act (FSA) 2013 (formerly Islamic Banking 1983 and Takaful Acts) of Malaysia.²⁸⁷ It was enacted on the recommendation of the National Steering Committee to regulate IB by modifying the Banking Act of Malaysia to the effect that:

Firstly, there must be a Religious Supervisory Council (RSC) consisting of 3 to 7 Muslim Religious Scholars (MRS) to advise the Bank on compliance.

Secondly, the Bank must comply with not only Islamic law, the Shari'ah, but equally governmental legal framework like the Contracts Act 1950, Bills of Exchange Act 1949.

Thirdly, all documents and instruments used in the Banking transactions must be structured in such a way as to be enforceable in the civil courts (same as in Nigeria).²⁸⁸

There are three other Malaysian Legislations regulating IBF operations vis-à-vis the FSA:

First, Government Investment Act (GIA) 1983 was enacted to enable IB to invest in non-interest bearing Government Investment Certificates (GIS); also known as interbank market.²⁸⁹

Second, Banking and Finance Investment Act enables non-Islamic Banks to operate IB Windows under the IB Scheme (IBS).

²⁸⁶ Abdul-Razzaq A. A. (2013). Non-Interest Banking and the Enabling Nigerian Laws: The Need for an Unprejudiced Assessment. *Journal of International Banking Law and Regulation (JIBLR)*, Issue 4, 145.

²⁸⁷ Act number 276 of 1983.

²⁸⁸ Ibid

²⁸⁹ Naughton, S., & Shammugan, B. (1990). Interest Free Banking: A case Study of Malaysia. *Journal of IBF*, Vol.7, No. 3, 46.

Third, The Central Bank National Shari'ah Advisory Council (CBNSAC) Act 1997 makes the IB Shari'ah advisors subordinate to the CBNSAC which is the sole supreme advisory authority on IB and Takaful.²⁹⁰

The Central Bank of Nigeria (CBN) had, as well, inaugurated Advisory Council of Experts on Islamic Banking and Finance. This council supervises all Islamic financial issues regulated by the CBN, Securities and Exchange Commission (SEC), Ministry of Finance (MoF), Capital Market, etc.

In Nigeria the legal regime that deals with IBF are many. Some come directly into play when mention is made of IB In fact the operation and structure of the banking system cannot stand without putting them into consideration. While others, though not directly in touch with ITS operations, one cannot but admit that even the laws that directly control IB drive their validity through them.

3.5.1 Constitution of the Federal Republic of Nigeria 1999

The Nigerian Constitution is the supreme law of the land. In the words of the Black's Law Dictionary, a constitution is:

“The organic and fundamental law of a nation or a state which may be written or unwritten, establishing the character and concept of its government laying the basic principles of which its internal life is to be conformed, organizing the government and regulating distributing and committing the functions of its different departments prescribing the extent and manner of sovereign powers.”²⁹¹

²⁹⁰ Hasani, I., (2009). Theory and Practice of Islamic Banking in Malaysia and its Implementation in Kosovo. *PhD Thesis API University of Malaya, Department of Sharia and Economy*. 142.

²⁹¹ Garner, A.G. (ed.), (2004). *Black's law dictionary*. USA: Thomson West, 231.

A significant feature of a constitution is that it is regarded as a supreme law endowed with higher status in a degree over and above other legal rules in its system of government.²⁹²

The constitution provides:

“This Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”²⁹³

The constitution states further that if any other law is in conflict with the provisions of the Constitution, that other law shall be void to the extent of the inconsistency.²⁹⁴

The 1999 Constitution, and of course all the other Nigerian Constitutions that pre date it, did not make mention of IBF.²⁹⁵ However, all laws dealing with the system derive their validity and root from the Constitution even where such laws are made before coming into force of the provisions of the Constitution. According to section 315 of the Constitution, all Federal laws valid before the coming into force of the Constitution are deemed valid as if they were made by the Constitution. The section aims to bring all laws predating the Constitution under the ambit of the Constitution and deem them as having been properly made under it. Thus, virtually all the laws regulating banking and finance practice in Nigeria fall within this category.²⁹⁶

The Nigerian Constitution has guaranteed every citizen the right to religion and conscience. The Constitution states:

“Every person shall be entitled to freedom of thought, conscience and religion, including the freedom to change his religion or belief and freedom

²⁹² Ibrahim, B.Y. (2010). An Appraisal of the Oversight Function of the Judiciary over the Legislative and the Executive under the American and Nigerian Constitutions. *Usman Danfodio University Sokoto Journal of Islamic Comparative Law (UDUSJICL)* Vol. 2, 52.

²⁹³ Section 1(1) CFRN 1999.

²⁹⁴ Ibid. Section 1(3).

²⁹⁵ Nigeria has had different constitutions at different times such as the 1963 and the 1979 Constitutions

²⁹⁶ Abikan, A.I. Op. Cite., 96.

(either alone or in community with others and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.”²⁹⁷

Since Islam is a complete way of life, a Muslim is entitled to practice every aspect of his religion including the right to avoid transactions that are contrary to the dictates of his religion such as banking transactions that have elements of Riba. It therefore follows that establishment of Islamic banking is a constitutional right of the Nigerian Muslims and any attempt to do otherwise is clearly a move to deny the Nigerian Muslims their constitutional right.

According to Mowoe (2003),²⁹⁸ respecting constitutional rights is an international obligation on Nigerians and the Nigerian government, and that the rights that pertain to Nigerians are not limited to those contained in the constitution but also the African Charter on Human Rights,²⁹⁹ and other international human rights instruments.³⁰⁰

However, this constitutional right shall not be exercised in such a manner as to contravene the provisions of the Constitution. Thus, IBF shall not be imposed on any citizen of Nigeria. The constitution has equally stated that no state shall practice the dictates of any religion to such an extent as to declare such religion as a state religion.³⁰¹ Similarly, the constitution has provided that no citizen of Nigeria shall be discriminated on the basis of ethnic group, place of origin, sex, religion and political opinion.³⁰²

²⁹⁷ Section 38(1) CFRN 1999.

²⁹⁸ Mowoe, K. (2003) *Constitutional Law in Nigeria* Vol. 1 Malthouse Press, Nigeria.

²⁹⁹ Article 8 provides for the freedom of conscience: “The profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.” See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Chapter A9 (Chapter 10 LFN 1990) (No 2 of 1983) Laws of the Federation of Nigeria 1990

³⁰⁰ See for instance United Nations' Declarations on Religious Intolerance 1981, Article 1 (1) which has the same provision with Section 38(1) of the Nigerian Constitution.

³⁰¹ Section 10 CFRN 1999.

³⁰² Section 42(1) CFRN 1999.

The establishment of Islamic bank does not contravene the provisions of the Constitution³⁰³ because IB is not meant for Muslims and it is also in compliance with other laws that regulate the banking industry in Nigeria. Thus apart from being Shari'ah compliant, it must equally be in accordance with all the laws regulating banks in Nigeria.³⁰⁴

Before the establishment of IB, Muslims in Nigeria have over the years suffered on how to deal with banks due to their interest dealings. Some take the risk of not dealing with banks at all. They therefore take the risk of keeping their money at home or some other unsafe places. While others deal with the banks but only open current accounts. Accordingly, working against IB in Nigeria is not only a contravention of a constitutional right but also an act of injustice that is not supposed to come from one that accommodates and respects the belief and right of others. The courts in Nigeria³⁰⁵ have taken the lead in making clear that every citizen of Nigeria has the right to practice his religion and the court will not allow any person or authority to deny any citizen of Nigeria this constitutional right.³⁰⁶

It is apparent that though the constitution has not expressly mentioned IBF, since it is the Grand Norm,³⁰⁷ all other laws derive their validity from it and as such it is appropriate to submit that the Constitution is a very vital legislation to this subject. After all, both the

³⁰³ Unfortunately the Christian Association of Nigeria (CAN) came out to criticize IB and maintained that it is unconstitutional. This opinion is clearly motivated by the seemingly unfriendly attitude of the Association towards Islam and Muslims. It is hoped that a day will come when Nigerians will appreciate the importance of the Bank and will be ready to accommodate one other.

³⁰⁴ Chiroma, M. (2011) Legal Feasibility and Economic viability of Establishing IB: An Analysis under the Nigerian Legal Framework. *University of Ibadan (Unib) Law Journal*, Vol. 1 No. 1, 92.

³⁰⁵ See Section 6 CFRN 1999.

³⁰⁶ See *Bashirat Saliu and 2 Other v The Provost Kwara State College of Education Ilorin And 2 Others* (Unreported) suit no. kws/28m/2006 ruling delivered 8th May, 2006

³⁰⁷ Kelsen, H. (2007). *Pure Theory of Law (Legality and Legitimacy)*. Oxford University Press, 978-0-19-922795-2

supporters and those who oppose the system rely on the Constitutional provisions to support their arguments.

Detailed discussions and suggestions will be made later regarding the provisions of the CFRN which require amendments.

3.5.2 Banks and Other Financial Institutions Act (BOFIA), 1991 (as Amended)

The Supreme Military Council³⁰⁸ in 1991 promulgated the Banking and other Financial Institutions Decree No. 25, 1991³⁰⁹ which for the first time in the history of Banking in Nigeria deviates from the conventional banking. It provided for a new kind of banking that is based on profit and loss sharing. The Act states that the President, on the recommendation of the Governor of the Central Bank shall from time determine as he deem appropriate the minimum paid up capital of each category of banks.³¹⁰

According to Sanusi, IB falls under the category of “specialized bank” recognized by the BOFIA 1991³¹¹ on the main, non interest banking and financial models are broadly divided into Non-interest banking and finance based on Islamic commercial jurisprudence and Non-interest banking and finance based on any other established law on interest principle.³¹²

IB as one of the models of non interest banking serves the same purpose of providing financial services as do commercial financial institutions save that it operates on the principles and rules of Islamic commercial jurisprudence that recognizes profit and loss sharing and the prohibition of interest, uncertainty and ambiguity relating to the subject

³⁰⁸ This was the highest law/decision making body in Nigeria during the Military era.

³⁰⁹ This Decree has automatically become or is deemed an Act of the National Assembly by virtue of Section 315 CFRN 1999. The BOFIA is now codified as Cap B3 Laws of the Federation of Nigeria, 2004

³¹⁰ Section 9 of BOFIA

³¹¹ Sanusi, L. S. (2011). Op. Cite, 6-7.

³¹² Ibid

matter, terms or conditions, gambling, speculation, right, unjust enrichment, exploitation or unfair trade practices, dealings in pork, alcohol, arms and ammunition, pornography, and other transactions, products, goods and services which are not compliant with the rules and principles of Islamic commercial jurisprudence.³¹³

Since IB is a peculiar kind of bank, the Bank and other Financial Institution Act (BOFIA) of 1991 (as amended) made provision for a number of exceptions to facilitate the smooth operations of non-interest banking. For example, the non-applicability of the need to display the interest rate in the bank premises of a profit and loss sharing bank. The Act states:

“Every bank shall display at its offices its lending and deposit interest rates and shall render 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.”³¹⁴

The Act further states that the Governor of the Central Bank of Nigeria can further exempt the profit and loss sharing bank from any of the provisions of the BOFIA as he thinks appropriate.³¹⁵

These provisions that set to exempt the profit and loss sharing banks from some of the shackles that could hinder its smooth operation is indeed a solid foundation that will assist in the smooth takeoff and operation of IB. This move has however left some lacuna that could at the end affect the smooth operation and trust of the public on the bank. For example the Act did not require the inclusion of memorandum and articles of association of the prospective Islamic bank which will spell out the establishment, composition and

³¹³ Ibid

³¹⁴ Section 23(1) BOFIA 1991.

³¹⁵ Ibid. Section 52.

qualifications of the members of board. The powers of the Governor of the Central Bank to make rules and regulations are restricted to the area of practice and procedure.³¹⁶ This will, in the long run, pose a challenge to Islamic banking. The Act is equally silent on the establishment of Shari'ah Advisory Board which at a glance does not look like a serious problem, but that could be a problem to the bank and its operations, after all consultation is highly valued by Shari'ah.³¹⁷

In Malaysia, the IB Act is a good example of how Islamic banking is supposed to be with requirements of Memorandum and Article of Association and a Shari'ah council as part of the conditions before a bank receives license to operate as an Islamic Bank. Section 3(5)(b) of the IB Act of Malaysia provides that the Central Bank shall not recommend the grant of a license, and the Minister shall not grant a license unless the Central Bank or the Minister, as the case may be, is satisfied that there is, in the Article of Association of the bank concerned, provisions for the establishment of a Shari'ah Advisory Body, as may be approved by the Central Bank to advise the bank on the operations of its banking business in order to ensure that they do not involve any element which is not approved by the religion of Islam.³¹⁸

In Nigeria, unlike in Malaysia where there is a special law enacted to regulate IB as seen above, the BOFIA is the key law in that respect which includes granting license to IB. A careful perusal of the law reveals that no mention was made in the law of the term "IB". In fact, the Act required the written consent of the Governor of the Central Bank the use of the following terms by prospective banks when applying for registration or incorporation: "...Central, Federal, Federation, National, Nigeria, Reserve, State,

³¹⁶ Ibid. Section 57.

³¹⁷ Qur'an 42:38 provides "Those who answered the call of their Lord, and establish regular prayer (*salat*) and whose affair are a matter of counsel and spend out of what we bestow on them for sustenance "

³¹⁸ Act 276 Law of Malaysia.

Christian, Islamic, Muslim, Qur'anic or Biblical...³¹⁹ The Central Bank relying on this provision issued a circular which proposes to prohibit the use of the phrase "IB"³²⁰ The circular could be ultravires the BOFIA which has not prohibited the use of the word IB rather, it restricts and subjects its usage to a prior consent and approval of the Governor of the Central Bank.³²¹ Each of such application is expected to be treated on its merit. Approval should be granted if the application is shown to be the aspiration of the majority shareholders and the bank also satisfies all the prerequisites of licensed bank.³²²

Whether or not the word IB is used, to the Muslim, the end justifies the means. Under Islamic law, actions are judged according to intentions.³²³ Since the bank operates on the Islamic principle of profit and loss sharing, avoidance of unlawful or forbidden properties like wine, pigs, corpse, human blood and Riba.³²⁴

It is worthy to mention that before a profit and loss sharing bank could engage in sales or disposal of real estate transactions, a written approval of the Central Bank Governor must be obtained.³²⁵ It is not clear, on the face of the Act, whether or not such approval is required for every transaction under the restricted Degree.³²⁶ Suffice it to say that such restriction is capable of hampering a smooth operation of IB products like direct investment, BBA, *ijara wa itqan* (hire and purchase) and *murabaha* (cost plus financing).³²⁷

³¹⁹Section 39(1)(a), BOFIA 1999.

³²⁰ Paragraph 10(1) CBN Draft Framework 2009.

³²¹ Abikan, I.A. (2010). The Legal Framework for Islamic Banking in Nigeria. *Usman Danfodio University Sokoto Journal of Islamic Comparative Law (UDUJICL)*, Vol. 2, 22.

³²² Ibid.

³²³ Bukhar hadith 2529 and Muslim Hadith 1907.

³²⁴ Bambale Y.Y. Op. Cit. 11.

³²⁵ Section 20(2)(c)(f)(g) BOFIA 1991.

³²⁶ Abikan, I.A., Op. Cite, 21.

³²⁷ Ibid.

3.5.3 Central Bank of Nigeria Act 2007

The Central Bank of Nigeria Act 2007 established the Central Bank.³²⁸ It is the apex bank that issues license, controls and supervises the operations of banks in Nigeria.³²⁹ It follows, therefore, that IB is under the control and guide of the Central Bank just as all the other banks in Nigeria.

The Central Bank has taken steps to defend its stand by saying that it was obliged by law to issue license to appropriate entities for the establishment of non interest banking provided they meet the regulatory requirements for license.

The Central Bank issued a Draft Framework to be a guide in the establishment of an Islamic Bank thus:

- (a) Islamic banks, referred to as non-interest banks, shall be licensed in accordance with the requirements for a new banking license issued by the Central Bank of Nigeria from time to time. Conventional Banks operating in Nigeria may offer Shari'ah-compliant products and services through their non-interest banking branches or windows. However, such branches or windows cannot offer conventional banking or interest based products and services.
- (b) Banks offering non-interest banking products and services shall not include the words "Islamic" as part of their registered or licensed name. This, the draft described as being in line with the provisions of Section 39 (1) of the BOFIA. They shall, however, be recognized by a uniform logo to be designed and approved by the CBN. The CBN shall require all the bank's signage and promotional materials to carry the logo to facilitate recognition by consumers.

³²⁸ Section 1 of the Central Bank Act 2007.

³²⁹ Ibid. Section 2.

- (c) The Central Bank shall set up an advisory committee on non-interest banking within the CBN to be called the CBN Shari'ah Council (CSC), which will be outsourced. The Council shall advise the CBN on Islamic laws and principles for the purposes of regulating non-interest banking business.
- (d) All non-interest banks are required to maintain a minimum Risk Weighted Asset Ratio of 10.0% or as may be determined by the CBN, from time to time, for the purpose of calculating its Capital Adequacy Ratio (CAR).
- (e) All applications must be submitted with the required documents including a non-refundable application fee of N500, 000.00 and deposit of minimum capital of N25 billion with the Central Bank of Nigeria.
- (f) Not later than six (6) months after the grant of an Approval in Principle (A.I.P.), the promoters of a proposed bank must submit application for the grant of a final banking license to the Director of Banking Supervision with a Non-refundable licensing fee of N5 million in bank draft payable to the CBN and other required documents.³³⁰

The controlling powers of the Central Bank of Nigeria over IB are seen from various angles. According to the Central Bank Act, the Central Bank can issue guidelines, rules and regulations for the operation of banks on any institution engaging on financial services as well as for enforcing the rules and regulations. The Central Bank equally gives approval and disapproval annually of the appointment of the Auditor by all banks; appoint Directors of banking, supervision and removing ailing bank's Manager, staff and Directors. In addition to issuance of order for special examination or investigation of any bank if it is in the interest of the public to do so or upon an application of a Director, shareholder, depositor or creditor of the bank.³³¹

³³⁰ Ibid

³³¹ Section 51 of the Central Bank Act 2003 and sections 31,32,33,35 and 40 of BOFIA.

3.5.4 Nigerian Deposit Insurance Corporation Act 2006

Section 1 of the Nigerian Deposit Insurance Corporation Act 2006 established the Nigerian Deposit Insurance Corporation (NDIC) as a government owned Insurance Corporation. The NDIC is established to protect the banking industry and provide financial guarantee to the depositor. In promotion and sustenance of public confidence in the banking system, the corporation is empowered to come to the aid of an insured bank in case of imminent or actual financial difficulties which may threaten payment.³³² This may be in the form of liquidity support to the banks on agreeable terms giving guarantees for the bank's loan or even taking over the management of a wobbling bank until its financial condition improves. In the event that the corporation exhausts all its protective alternatives and a failing bank still has to postpone payment, the corporation is obliged to pay every insured depositor up to the insurable limit.³³³

It is important to mention that some of the relationship between IBF and the NDIC have the element of *riba* and hence contrary to Islamic law. For example, investment of the scheme's fund in the federal government security has elements of *riba*.³³⁴ Insurance business generally is in conflict with the principles of the Shari'ah for it has elements of gambling (*qimar*), uncertainty (*gharar*) and unspecified and unknown elements (*jahala*). It is therefore important for the NDIC Act to be amended so that its dealings with IBF will be in consonance with the rules of the Shari'ah. This is a condition precedent to the attainment of harmony in Nigeria as the Muslim majority will be able to perform economically within the realm of their religion as their constitutional right.

³³² Section 2(1)(b) & 37(2) of the NDIC Act 2006.

³³³ Ibid Section 20(1).

³³⁴ Section 13(1) of the NDIC Act 2006.

3.5.5 Case Law

Since the courts are the ones constitutionally vested with the power of interpreting the laws,³³⁵ their role, as a source of the Nigerian laws regarding IBF, needs not be over emphasized. The High court has the jurisdiction over issues relating to banking generally and that includes IB. However, where the matter relates to dispute between banks, the federal high court has the exclusive jurisdiction. Appeals from the decisions of these courts rest in the Court of Appeal and then the Supreme Court. The decisions of these courts are, therefore, source of law for IBF as they are binding on all lower courts.

As I.B.F. in Nigeria is at its nascent stage, unlike Malaysia, Indonesia, India, Pakistan and the U.A.E, the most popular unreported case is the one in which the legality of the only fully fledged I.B. in the country was challenged. On 15th June, 2012, Justice Gabriel Kolawale of Abuja Federal High Court declared, by *obiter dictum*, the Jaiz Bank's license as ultravires null and void, although, fortunately, did not withdraw or revoke the license. He declared that:

Firstly, there are no provisions in the CBN Act and the Banks and other financial Institutions Act (BOFIA) that empowers the CBN Governor Sanusi Lamido Sanusi to issue license for non-interest financial institution to operate under the principles of Islamic jurisprudence without the approval of the head of state through the minister of finance.

Secondly, unlike the other specialized banks, the Jaiz International Bank PLC, can only be established in the country with the intervention of the National Assembly by amending the BOFIA Act.

Thirdly, if not because the plaintiff has no *locus Standi* (The right or capacity to bring an action) to maintain this action, I would have nullified the illegal license issued to the Jaiz

³³⁵ Section 6 CFRN 1999.

International Bank PLC by the CBN to operate non-interest banking under the principles of Islamic jurisprudence.

Fourthly, that this case is hereby struck out for lack of *locus standi*, but the AGF should take steps to remedy the situation, and further ensure that the CBN carries out its duties within the provisions of the law establishing it.³³⁶

Although the court was silent about the applicant's plea to declare the licensing of the bank 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, this legal ground poses a potential threat to IBF and hence its discussion in this research to forestall its negative consequences in case the Federal Attorney General, who has the locus standi, decides to file such a case.

By way of case study, there are two leading Malaysian cases relevant in this context:

Firstly, in the case of *Bank Islam Malaysia Berhad (BIMB) v Adnan bin Omar*, there was a preliminary objection raised by Adnan claiming that the Malaysian Civil Courts, unlike the Shari'ah Courts, have no jurisdiction over IB litigations.³³⁷ The court overruled the objection on the ground that since banking matters are under the Federal Legislative list, it has jurisdiction to entertain the case.³³⁸

There was an amendment to the Central Bank of Malaysia Act 1958 (now 2009) (CBMA) which has incorporated the following:

³³⁶ *Godwin Sunday Ogboji v Governor of Central Bank Nigeria & Ors* (2011) Supra (Op. Cite.).

³³⁷ There was an amendment to Article 121 of the Malaysian Federal Constitution 1957, in 1988, which restrains Civil Courts from having jurisdiction to hear cases where Islamic law is applicable and is now vested in the Sharia courts.

³³⁸ Yasin, N. M. (2006). *Legal Aspects of Islamic Banking: Malaysian Experience, Islamic Banking and Finance: Fundamentals and Contemporary Issues*. Jeddah: Islamic Development Bank (IDB), cited by Azma, N., (2014) Issues and Prospects of Islamic Hire Purchase Financing: Malaysian Evidence. *Journal of Management Research*, vol. 6, no. 1, 14.

“Where in any proceedings relating to Islamic banking business...or any business which is based on Shari’ah principles and is supervised by the Bank (Central Bank of Malaysia) before any court or arbitrator any question arises concerning a Shari’ah matter, the court or the arbitrator, as the case may be, may take into consideration any written directives issued by the Bank pursuant to subsection (7); or b) refer such question to the Shari’ah Advisory Council for its ruling.”³³⁹

The second leading Malaysian case, although the decision is no longer in practice, is the case of *Ramah v Laton*, where Islamic law was held to be part of *lex loci* (law of the land) of which the Court must take judicial notice. It means that the judge must propound the law and it would not be justified for him to call expert evidence related to any issue pertaining to Islamic law in the court proceedings. The judge is deemed to know the law, as Islamic law is regarded as local law, or at any rate must be able to find it - in statute, case law reports or academic writings.

Whenever necessary, the civil court judge, trained in secular and Common law, will interpret the Shari’ah law and apply it before he or she comes to a decision.³⁴⁰ This is the main problem focused in this research as the situation is the same under the 1999 Nigerian constitution. Detailed suggestions for constitutional amendments come up later in this chapter.

³³⁹ Ibid, 226

³⁴⁰ Ibid

3.5.6 Fatwa (Authoritative Scholarly Decision) Made by Experts Advisory Council (EAC):

This is the equivalent of the SCC and NSAC in Malaysia. In as much as the professional advice of this council, to the Bank or the financial institution, is being used to determine the compliance or compatibility status of proposed products, it has become a mini-legislature.³⁴¹

3.5.7 Federal High Court (Civil Procedure) Rules 2009:

This law regulates the litigation procedure of the Federal High Court, the court which the constitution, exclusively, vested the jurisdiction to decide matters between banks and between banks and other government and corporate bodies.³⁴² The High Courts (Civil Procedure) Rules of the various state High Courts and the Federal Capital territory regulate IBF matters between individuals and banks.³⁴³ Despite the fact that the judges in those courts need not, by law, to have knowledge of the Shari'a, which governs IBF, they were erroneously vested with the jurisdiction to such matters exclusively. This is in tandem with the view of Buang, A. H. (2007).³⁴⁴

The Sharia Courts of Appeal in the country have no jurisdiction to handle IBF matters³⁴⁵ even though their Kadis (judges) are the most qualified in all Islamic matters. This is one of the areas where this thesis suggested for amendments. There are serious lacunae in the constitution as it vests jurisdiction, over IBF matters, on judges and justices not learned in

³⁴¹ Buang, A. H. (2005). Op. Cite, 325 quoted Rachagan, S. (2005). Islamic Banking in Malaysia. *Journal of International Banking Law and Regulation*, 92; Buang, A. H. (2002). Analisis Fatwa-fatwa Semasa Syariah di Malaysia (Analysis of Current Fatwas in Malaysia) *Jurnal Syariah, Bahagian Pengajian Syariah, Akademi Pengajian Islam, Universiti Malaya*; Buang, A. H. (2004). (Editor), *Fatwa di Malaysia (Fatwa in Malaysia), Jabatan Syariah dan Undang-undang, Akademi Pengajian Islam, Universiti Malaya*.

³⁴² Section 251 (1) (d) CFRN 1999

³⁴³ Ibid

³⁴⁴ Buang, A. H. (2007) Islamic Contracts in a Secular Court Setting: Lessons from Malaysia. *Arab Law Quarterly*, 318

³⁴⁵ Section 262 (1) CFRN 1999

the general (not just personal) Islamic law. Adjudication is about knowledge and the constitution should respect this fact which is *sine quo non* to real justice delivery.

3.5.8 Other IBF Regulatory Laws:

Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Act 1994, Money Laundry Act, 1995 and CBN Prudential Lines, as well as any other monetary, foreign, trade and exchange policy circulars that may be issued by the regulatory authorities from time to time.

3.6 The Lacunae Concerning IBF in the 1999 Nigerian Constitution:

Following the introduction of interest free banking and finance system (such as IBF) in Nigeria by the Central Bank in 2011, many issues came to the limelight and needed to be addressed. One of such problem is the issue of the courts and judges who are supposed to handle litigations relating to the issue of IBF. The Constitution of Nigeria 1999 which predates the coming of the system did not, *inter alia*, make provision for the jurisdiction of the Shari'ah Court of Appeal (SCA) as it relates to it. Naturally, since the constitution did not contemplate, it will not be surprising to witness such lacunae in it.

An important law that comes to play, when mention is made of banking and finance in Nigeria, is the Banks and Other Financial Institutions Act 1991 (BOFIA). The provisions of BOFIA, however, relates to the operational guidelines and the establishment of Banks and other financial institutions. Issues that concern jurisdiction of courts are always left to the law creating the courts.

Dr Kamaluddeen Dawud made the following contribution during the interview with him with my representative, Alhaji Umar Alkali:

“Although IBF has come to stay in Nigeria, all matters covered by the Companies and Allied Matters Act, which includes IBF, are exclusively handled by the Federal High Court. The Shari’ah Courts have no jurisdiction although the issues are of the Shari’ah economic system. The constitution has to be amended to confer jurisdiction to the Shari’ah Court of Appeal on IBF matters because the Qur’an says Allah’s laws should be followed *intoto*, wholly (*kaaffah*). The other challenge is in the lack of a specific legislation on the IBF system. The Banks and other Financial Matters Act is inadequate. It should be amended to clearly include IBF or a new special IBF Act should be enacted to be part and parcel of our laws. It should not continue to operate under CBN Policies which can be easily changed.”³⁴⁶

Since the Shari’ah Court of Appeal is a creation of the Constitution, it has made provisions for its jurisdiction which is limited to Islamic personal law only.³⁴⁷ The original jurisdiction on matters between individuals and banks are vested on the Federal Capital Territory and State High Courts while matters between banks and institutions are exclusively vested on the Federal High Courts. It is also called the Federal Revenue Court.³⁴⁸ As IBF is built upon the Shari’ah, it requires persons with knowledge of Islamic principles to adjudicate on such disputes. The fact that judges of the Federal High Court and State High Courts are not trained in Islamic law and the constitutional requirement for their appointment does not require knowledge of the Shari’ah,³⁴⁹ makes them unfit to

³⁴⁶ Dr Kamaluddeen Dawud, Chairman Muslim Lawyers Association of Nigeria. He is also a Member of the Committee on Constitutional Amendment of Nigeria representing all the Sharia Courts of Appeal in Nigeria on August 23, 2014. (22nd March, 2013, Abuja, Nigeria).

³⁴⁷ Section 277 CFRN 1999.

³⁴⁸ Ibid. Section 251.

³⁴⁹ Sections 231 CFRN 1999 for the qualification requirement of Chief Justice and Justices of the SC, S. 238 for FCA, S. 250 for FHC, S. 271 for State CJ/H CJ. The constitution requires being a lawyer for 10 year for HCJ and 15 years for FCA and the SC. The only requirement for knowledge of the Sharia is for at least 2 justices on Islamic personal law, not general Islamic Law.

handle matters of IBF effectively.³⁵⁰ The issue of concern, when cases of Islamic banking are handled by the judges of the Shari'ah Court of Appeal and other Shari'ah judges, is that most of them have not received training on the conventional commercial law as shown by the requirement for their appointments. This chapter, therefore, intends to discuss the constitutional gaps in the provisions relating to the proper adjudication of IBF matters in the proper courts and by the proper judges.

The Shari'ah Court of Appeal has unlimited jurisdiction in all matters relating to Islamic personal law. Matters relating Islamic personal law include marriage contracted in accordance with the principles of the Shari'ah, divorce and guardianship of children. Others include *waqaf* (charity or endowment) made by a Muslim or a Muslim organizations,³⁵¹ succession or will where deceased or testator is a Muslim. This is in addition to any other additional jurisdiction that could be added to the Shari'ah Court of Appeal by the state House of Assembly:³⁵²

“(1) The Shari'ah Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.”

It is important to mention that any additional jurisdiction conferred on the Shari'ah Court of Appeal must not be in conflict with the provision of the constitution. For example, a Shari'ah court of Appeal cannot be vested with jurisdiction to entertain matters affecting

³⁵⁰ Most of them are non-Muslims; even the present Chief Judge of the Federal High Court Ibrahim Auta is a non-Muslim. Recently, new judges were appointed in the Federal High Court and most of them are non-Muslims. Even if they are Muslims, since the court has no connection or business with Islamic law, it will not be expected of them to have the training of judges required from the Islamic perspective.

³⁵¹ However, the *Waqf* must not have been registered under the Land Use Act, 1978 because any land that is registered under the Land Use Act will be under the exclusive jurisdiction of the High Court.

³⁵² Section 277 CFRN 1999.

election petition because the Constitution has conferred the exclusive jurisdiction on those matters on the Election Petition Tribunals.³⁵³ IBF matters are within the exclusive jurisdiction of the Federal H. C. and the Superior courts (when the matter goes on appeal to the superior Courts of Record). According to the Constitution, any law that is in conflict with the Constitution shall be void to the extent of its inconsistency.³⁵⁴

According to Akande, the constitution has restricted the jurisdiction of the Shari'ah Court of Appeal to matters of Islamic personal law. Issues of Islamic personal law often fall under matters of Islamic family law such as marriage, divorce and inheritance. Similarly, the jurisdiction of the court is restricted to Muslims. That means the Shari'ah Court of Appeal does not have jurisdiction over non-Muslims except where the parties consent to the jurisdiction of the court.³⁵⁵

After the introduction of Islamic criminal law by some states in the Federation,³⁵⁶ the jurisdiction of the Shari'ah Court of Appeal was expanded by some of the states to include issues of Islamic law of crime and IBF;³⁵⁷ both as a court of first instance and of appellate jurisdictions. In these states, the Shari'ah Court of Appeal has the jurisdiction to entertain matters of IBF. But the validity of the additional jurisdictions issued has not been tested before the Court of Appeal or the Supreme Court. It is however important to state that the Court of Appeal while interpreting the issue of additional jurisdiction to the Shari'ah Court

³⁵³ Section 285 CFRN 1999.

³⁵⁴ Ibid. Section 1(3).

³⁵⁵ Akande, J. O. (2000). *Introduction to the Constitution of the Federal Republic of Nigeria 1999*. Nigeria: MIJ Publishers, 389.

³⁵⁶ Zamfara State was the first to introduce Sharia, by its former governor Senator Ahmed Sani Yerima. The introduction of sharia was faced by stiff opposition by many non-Muslims. That led to the Kaduna sharia riot and other conflicts across the country which led to the loss of thousands of innocent lives. At present, though the sharia laws exist, there is serious lack of political will to enforce it by almost all the states that promulgated the law. In short, the implementation of sharia penal code in Nigeria has died a natural death. This is probably due to the simple fact that most of the governors promulgated the law due to political pressure from the masses and scholars that earnestly called for the promulgation of the sharia penal law as required by Allah and guaranteed by the Nigerian Constitution. See section 34 CFRN 1999.

³⁵⁷ For example Zamfara and Kano states of Nigeria.

of Appeal under Section 242(2) (e) the 1979 Constitution stated in the case of *Ummara Fannami v Bukar Sarki*³⁵⁸ that the increment of the jurisdiction of the Shari'ah Court of Appeal must remain within the confines of issues relating to Islamic personal law. If this decision were to be extended to the 1999 Constitution, it will mean the Shari'ah Court of Appeal's additional jurisdiction does not extend to the issue of IBF.³⁵⁹

A constitutional issue that comes to play when the jurisdiction of the Shari'ah Court of Appeal is extended to include issues of IBF is that it makes it the court of last resort on these matters. This is because the constitution has expressly mentioned that the court of appeal entertains appeals from the Shari'ah Court of Appeal with respect to matters relating to Islamic personal law.³⁶⁰ Since Islamic banking does not fall within the domain of Islamic personal law, that means the Court of Appeal cannot entertain appeals relating to those issues. The appeal from the decisions of the Shari'ah Court of Appeal cannot, logically, rest in the Supreme Court because the constitution has clearly mentioned that the Supreme Court only entertains appeals from the Court of Appeal.³⁶¹ Going by this, the Shari'ah Court of Appeal will therefore be the last court of resort on all matters relating to IBF. Since the Court of Appeal has previously insisted, while interpreting the 1979 Constitution, that the additional jurisdiction of the Shari'ah Court of Appeal must remain within the confines of Islamic personal law, the probability of making a similar interpretation when it comes to extension of the jurisdiction of the Court under the 1999 Constitution cannot be ruled out. One can argue for and against IBF matters ending at the SCA. While it save cost and time as well as avoid delay in justice delivery, it can also be argued that doing so

³⁵⁸ (1961-1989) 1 Sh. L.R.N. 194.

³⁵⁹ *Maida V Modu* (2000) 4 NWLR (at 659) at 99.

³⁶⁰ Section 244 CFRN 1999.

³⁶¹ *Ibid* Section 233(1).

will trigger religious controversy as non-Muslims, involved in IBF matters, may claim infringement of their rights to be heard in secular courts.

In my interview with Barrister Alhaji Umar Alkali³⁶² on Thursday, January, 2015 he revealed that the association of Kadis and Presidents of the Customary Court of Appeal, in their memorandum to the Constitutional Amendment Committee that visited the North Eastern Nigeria, stated that the jurisdiction of the Shari'ah Court of Appeal in the Constitution should cover Islamic law generally. If that is made, i.e. Islamic personal law is replaced with Islamic law; the jurisdiction of the Shari'ah Court of Appeal will then cover all issues including IBF and Islamic criminal law. Appeals to be entertained by the court of Appeal from the Shari'ah court will include issues of Islamic law generally thereby including IBF. The above would entail three things:

Firstly, original jurisdiction should be vested on the SCA, in addition to its existing appellate jurisdiction.

Secondly, the jurisdiction clause in section 251(1) (d) of the constitution regarding exclusive jurisdiction to the Federal High Court, should be expunged. It provides:

(1) Notwithstanding anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters - (d) connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures:

³⁶² Barrister A. U. Alkali was a member of the constitution amendment advisory committee appointed by the government of Borno State of Nigeria.

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank...

Note that the phrase “Notwithstanding anything contained in this Constitution” negates the powers of the state legislature under section 277 (1) to vest additional jurisdiction on the SCA because it means even if there is any contrary provision in the constitution, only the FHC should exclusively handle Banking and Finance matters as the court of first instance (meaning that the FCA and the SC can handle such cases on appeal only).

Thirdly, the Area Courts Edict and the Area Courts Civil Procedure Codes of the various states should unambiguously enshrine the jurisdictions of the various Shari’ah Courts to entertain IBF matters. This is because, currently, appeals from those courts, on Islamic non-personal matters, go to the High Courts.³⁶³

As to the qualifications for appointment to the office of a Kadi of the Shari’ah Court of Appeal, the constitution states that a person cannot be qualified to hold the office of the Grand Kadi or Kadi of the Shari’ah Court of Appeal unless -

(a) he is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council; or

(b) he has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than ten years; and

(i) he either has considerable experience in the practice of Islamic law, or

³⁶³ Area Courts Edict 1968.

(ii) he is a distinguished scholar of Islamic law.³⁶⁴

With regards the first requirement, a person becomes a legal practitioner in Nigeria if he is called to the Nigerian Bar by the Body of Benchers;³⁶⁵ that is after he has satisfied all the requirements set in by the Council of Legal Education. The requirement is that such a person must obtain an LL.B. (Bachelor of Laws) from a recognized institution approved by the Council of Legal Education to run an LL.B. program and he must have been called to the Nigeria Bar on passing the Bar Exam.³⁶⁶ The other legal requirement is that such a person must have a certificate on Islamic law from a recognized institution. The definition of the institution has not been made by the Constitution talk less of the syllabi that is expected to be reflected in the curriculum of the institution. Similarly, there is equally no requirement as to personal qualities etc. Going by this requirement, even a non-Muslim who possesses all the required qualifications is qualified to hold the office of the Kadi of the Shari'ah Court of Appeal.³⁶⁷ This provision has to be amended to clearly state that only Muslims can preside over matters directly relating to Islam such as IBF; this to fulfill a requirement for the qualification of a Kadi, or judge, under the Shari'ah.

The second leg of the qualification which seems to be unnoticed by many is the fact that the constitution used the conjunction 'or'; meaning if that person is not qualified as a legal practitioner and has a certificate of Islamic knowledge from an institution of higher learning, he could still be qualified for appointment as a Kadi of the Shari'ah Court of Appeal. That is to say if he has obtained a certificate in Islamic law from an institution

³⁶⁴ Section 276(3) CFRN 1999.

³⁶⁵ Section 2 of the Legal Practitioners Act.

³⁶⁶ For persons that obtain a law degree outside Nigeria from institutions recognized by the Council of Legal education, they are required to undergo Bar Part 1 in the Nigerian Law School. The bar Part 1 is aimed at introducing the Nigerian legal System to them and the program lasts for six months. After passing the Bar Part 1, they will proceed to Bar Part two where they will undergo the same training with graduates from Nigerian Universities.

³⁶⁷ This is because the Constitution has not stated that the office of the Qadi or grand Qadi of the sharia Court of appeal shall only be held by a person professing the religion of Islam.

recognized by the National Judicial Council and has a considerable experience as a judge or is a learned Islamic scholar.³⁶⁸ This provision is commendable; however, it is vague and subjective in nature and as such is subject to abuse. The meaning of a learned Islamic scholar to a Professor in Islamic law or Islamic studies will definitely be different from that of the ordinary person on the street. It is therefore not clear and the parameter for determining a learned Islamic scholar is very difficult to determine. The constitution should be amended to clarify who is a learned Islamic Scholar.

If learned Islamic scholars will occupy the office of a Kadi, the output of the decisions of the Shari'ah Court of Appeal will be very rich and that is exactly what is expected from a court of such ranking. The requirement for certificate is alien to Islam. It only became a matter of necessity due to contemporary realities that certificates are one of the ways of determining or verifying a person's qualification or knowledge. Unfortunately, these learned Islamic scholars that get appointed to the office of the Kadi cannot go beyond the stage of the Shari'ah Court of Appeal because it is a requirement that a person cannot be qualified to be promoted to the office of a Justice of the Court of Appeal until he is qualified to practice as a legal practitioner in Nigeria for at least 12 years.³⁶⁹ It will therefore be appropriate to suggest that the Constitution should be amended to allow the promotion of Kadis who are learned Islamic scholars to the Court of Appeal and the Supreme Court even if they are not legal practitioners.³⁷⁰ It will be appalling to allow the decisions of learned Islamic scholars to be reversed on Appeal at the Court of Appeal or Supreme Court by justices that are privileged to be there by virtue of the fact that they are legal practitioners but ironically and appallingly unlettered in Islamic jurisprudence.

³⁶⁸ Akande, J.O. (1999) Op. Cite., 389.

³⁶⁹ Section 238(3) CFRN 1999.

³⁷⁰ They are there by virtue of their knowledge of Islamic law. Similarly as experts on Islamic law, their contribution to sound decisions, example in IBF matters, need not to be over emphasized.

There is the absolute need to extend the stringent requirement for the office of the Kadi even to the Shari'ah courts at the lower cadre. Though some states, like Kano state, have made laws stating the minimum requirement for qualification to the office of a judge of the Shari'ah Court or Upper Shari'ah Courts, more states need to follow suit.³⁷¹ In Sokoto state, a person will not be qualified for appointment as a judge of the Shari'ah Court unless he possesses qualifications such as a University Degree in Islamic Law or Diploma in Shari'ah and Civil Law recognized by the Judicial Service Commission of the State.³⁷² From the researcher's experience, in Borno state, in addition to the need for a certificate to show that a person has the qualification to be appointed as a Shari'ah Court judge, there is the need for the person to pass an oral examination conducted by learned Islamic scholars such as Sheikh Muhammad Ali Gapchia OF Borno State, Nigeria.³⁷³ If that is done, some of the fundamental errors seen in the judgments of the Shari'ah courts that are clearly due to lack of knowledge on some basic Shari'ah rules of adjudication will be averted. Such mistakes affect the credibility of the courts and raise questions as to why such things happen in courts that are expected to represent Islamic law. For example in the case of *Amina Lawal v The State*³⁷⁴ the accused was charged for the offence of Zina under the Sokoto State Shari'ah Penal Code. The allegation was that she delivered a child two years after divorce. The Upper Shari'ah Court sentenced her to death by stoning. This decision brought the attention of anti-Shari'ah groups, especially in the west, and the media closely followed the events. The decision was set aside on appeal because, under Maliki School, a child remains a legitimate child of the former husband even after two years of the

³⁷¹ See section 11 of the Sharia Courts Law, 2000 of Kano State.

³⁷² See section 4 of the Sharia Courts Law, 2000 of Sokoto State.

³⁷³ This addition is very fruitful because through that the committee will be able to know those that have the certificates but when it comes to practical application of the knowledge they will not be able to deliver. In justice delivery, what is important is the result of the knowledge and not volumes of certificates.

³⁷⁴ Yawuri, A.M. (2007). *On Defending Safiyatu Hussain and Amina Lawal*. Quoted in *Sharia Implementation in Northern Nigeria 1996-2006*, A Source Book, Vol. 5, Ostien, P. ed. Ibadan: Spectrum Books Ltd., 122.

dissolution of the marriage between the parents.³⁷⁵ The decision of this Shari'ah court was clearly due to lack of knowledge of this basic Islamic law principle. In the end, it was like a political defeat for Shari'ah because the anti-Shari'ah groups were everywhere celebrating that their struggle was able to save the life of the woman that was sentenced to death by a Shari'ah court.³⁷⁶ If such a mistake can be made relating to serious issues like death sentence, one could imagine the severity of the situation in minor cases like *hadana* (custody).³⁷⁷

The appointment to the office of the Grand Kadi of the Shari'ah Court of Appeal of a state is made by the Governor of the state on the recommendation of the National Judicial Council subject to the recommendation of the State House of Assembly of the State.³⁷⁸ Similarly, the Qadis of the Shari'ah Court of Appeal are appointed by the Governor of the State on the recommendation of the National Judicial Council.³⁷⁹ The procedure for appointment of the Qadis of the Shari'ah Court of Appeal is the same with that of the High Court Judges. The status of the Shari'ah Court of Appeal is similar to that of the High Court.³⁸⁰ However, while the Chief Judge is the head of the Judicial Service Committee of the state, the Grand Kadi is an ordinary member. That has put the High Court in an

³⁷⁵ Under Islamic law, the minimum period of gestation is 6 months this is deduced from the interpretations given to the following Qur'anic verses thus: Qur'an, Baqarah:233, Qur'an, Lukman:14 and Qur'an, Ahzab:15. The first two chapters state that a mother should give suck for two years (twenty four lunar months), while the third chapter states that the child's pregnancy and weaning is thirty months. If twenty four months is subtracted from thirty months, six months will be left hence the minimum gestation period see Ali, A.Y., The Holy Qur'an 3rd edi. Op. Cite., 291. There is no consensus opinion as to the maximum period of gestation some scholars opined two years, some four while others even five years. Scientifically it is possible for fetus to remain in the womb for several years unnoticed. Recently in Japan, a woman was discovered to have been living with a fetus for 40 years. It was initially thought to be a disease that requires surgery. But after series of medical examinations, it was discovered to be a fetus. 8.00pm News of 12 December, 2013, NTV9

³⁷⁶ Yawuri, A.M. Op. Cite., 130

³⁷⁷ That same judge was later promoted as a Kadi of the Sharia Court of Appeal in Sokoto State.

³⁷⁸ 276(1) CFRN 1999.

³⁷⁹ 276(2) CFRN 1999.

³⁸⁰ While the Chief Judge is the head of the high court, the Grand Kadi is the head of the Sharia Court of Appeal of the state. Even in terms of salary, the judges of the high court and the Kadis of the Sharia Court of Appeal have the same salary scale.

advantaged position over and above the Shari'ah Court of Appeal. That has, therefore, created a situation of struggle for power or relevance between these important distinct offices saddled with the responsibility of adjudication in the state. There is the need to upgrade the status of the Grand Kadi to make it equal to that of the Chief Judge. The need to do that has resulted in the agitation for making the chairmanship of the State Judicial Service Committee to be rotational between the Chief Judge of the High Court and the Grand Kadi of the Shari'ah Court of Appeal. This is cogent considering the fact that the State Chief Judge and the Chief Justice of the Federation, as the Chairman of the state and Federal Judicial Service Committees respectively, handle all the affairs of both the Shari'ah and High Court Divisions even if he is only learned in English law. Just as problems in science and technology are solved by research, the same applies to the social science based research such as this one on the constitutional problems affecting IBF. IBF in Nigeria is principally governed by other laws which derive their validity from the Constitution of the Federal Republic of Nigeria 1999. Since the constitution is the ground norm, it is not expected to provide for everything. But the issue of the constitution directly affects IBF when the issue of the court with jurisdiction on the subject is discussed. All the courts that are vested with the jurisdiction to litigate on banking matters are created by the constitution. Unfortunately, the constitution fell short of giving the jurisdiction to the appropriate court that is presided over by experts on Islamic law the jurisdiction to entertain matters on IBF. This subhead, therefore, intends to examine this fundamental lacuna in the Nigeria Constitution which may directly affect the smooth operation of the system since dispute or litigation is unavoidable in the banking and finance industry. The need to squarely address this shortcoming need not be over emphasized. Since the system is just taking up in Nigeria, there are not yet issues on it before the Nigerian courts for now, the earlier this issues are addressed, the better for the industry. The Malaysian

experience symbolized by the Affin case and others could be utilized for the teething Nigerian status.

The above discussion is a foundation for the proper examination of the Constitutional anomalies that will arise in litigations relating to the system. These anomalies relate to the restriction the constitution has placed on the jurisdiction of the SCA to entertain appeals from the decisions of the Upper Shari'ah courts only on matters relating to Islamic personal law. The court of Appeal is equally vested with jurisdiction to entertain appeals from the Shari'ah Court of Appeal only on matters over which the Shari'ah Court of Appeal is vested with jurisdiction (that is matters relating Islamic personal law).

Recently, there was a move to amend the provisions of the 1999 Constitution. The National Assembly set up a Committee to go round the six geo political zones in Nigeria³⁸¹ in order to source suggestions from experts, NGOs and the general public. The Association of Kadis of the Shari'ah Court of Appeal and Presidents of the Customary Courts of Appeal submitted a memorandum to the Committee to, *inter alia*, establish a Shari'ah Court of Appeal, that is independent at the national level whose jurisdiction and status is equal to that of the Court of Appeal, to entertain appeals from the Shari'ah Courts of Appeal of the states. If that is done, it will go a long way in reducing the traffic jam faced in dispensing Shari'ah cases at the Court of Appeal. That will equally uplift the status of the Shari'ah Courts and the Kadis (Shari'ah judges). This was revealed by Dr. Kamal Dawud.³⁸² Training the judges in handling IBF litigations is another solution.

³⁸¹ The six geopolitical zones include North East, North West, North Central, South East, South South and South West. The division Nigeria into geopolitical zones is not made by the Constitution. The Constitution only provided for 36 states and the federal capital territory. This division into geopolitical zones is made for the purpose of convenience and for the purpose of respecting the issue of national character in appointment so that every zone in the federation will be fully represented in national appointments and will be involved in important national issues.

³⁸² An interview by Alkali, A. U. with a member of the Committee and Vice President Muslim Lawyers Association of Nigeria (MULAN) Dr. Kamal Alhaji Daud on 4th August, 2013, in Maiduguri Borno State, Nigeria.

A very important court that must be mentioned whenever litigations relating to banking are mentioned is the Federal High Court.³⁸³ According to the Constitution, the Federal High Court shall have exclusive jurisdiction to entertain matters relating to disputes between banks and between a bank and the Central bank of Nigeria. The Constitution is clear to the effect that does not include a dispute between a bank and its customer.³⁸⁴ A person can only be qualified to be appointed as the Chief Judge or a Judge of the Federal High Court if he is qualified as a legal practitioner in Nigeria for not less than ten years.³⁸⁵ The appointment of the Chief Judge of the Federal High Court is made by the president on the recommendation of the National Judicial Council subject to the confirmation of the Senate.³⁸⁶ With respect of other judges of the court, the appointment is made by the president on the recommendation of the National Judicial Council, in this case, without Senate confirmation.³⁸⁷

The next court saddled with the responsibility to entertain cases relating to banks is the state High Court. The difference between the State High Court and the federal High Court's Jurisdiction is that, while the former entertains disputes between individual customers and banks the latter entertains disputes between banks or between banks and the Central bank of Nigeria.³⁸⁸ The state High court is equally a creation of the Constitution.³⁸⁹ It is a court of unlimited jurisdiction.³⁹⁰ A person shall not be qualified to hold the office of a chief Judge or as a judge of the High court unless he is a qualified legal practitioner for not less than ten years.³⁹¹ The appointment of the Chief Judge is made by the Governor of a state

³⁸³ The federal High court is established by virtue of Section 249(1) of the Constitution of the Federal Republic of Nigeria 1999.

³⁸⁴ Section 251(1) (d) CFRN

³⁸⁵ Ibid. Section 250(3).

³⁸⁶ Ibid. Section 250(1).

³⁸⁷ Ibid. Section 250(1).

³⁸⁸ Ibid. Section 251(1)(d) CFRN 1999.

³⁸⁹ Ibid. Section 270(1)(a).

³⁹⁰ Ibid. Section 272

³⁹¹ Ibid. Section 271(3)..

on the recommendation of the National Judicial Council subject to confirmation by the House of Assembly of the State.³⁹² While that of other judges is similar to that of the chief Judge except that there is no requirement for the confirmation of the State House of Assembly.³⁹³

The lacunae in the Nigeria constitution spring from the paucity of man power³⁹⁴ in the judiciary to handle IBF litigations. It gave jurisdiction to the Federal High Court in disputes between banks and institutions while the High courts on all disputes between banks and individuals. Unfortunately, the Shari'ah court of Appeal which is the court presided over by experts on Islamic law does not have jurisdiction over matters of Islamic banking. It only has jurisdiction over matters of Islamic personal law. This is a huge shortcoming and a monumental gap in the Nigerian constitution that directly affects Islamic banking and Finance. It is a fact that disputes of Islamic banking is twofold. There is the banking aspect which is governed by the CBN Act and BOFIA and then the Islamic finance aspect. Since some Kadis of the SCA are lawyers and experts in Islamic law matters as well, that can rest the fear that it will be at the expense of the laws governing banking in Nigeria if Shari'ah Court of Appeal is given the jurisdiction over this matter since the Shari'ah judges are experts on Islamic law only.

In view of the important role played by the Shari'ah court judges in the dispensation of justice, it is important to examine the qualification of a judge under Islamic law. In other words, before a person becomes qualified to be appointed as a judge of a Shari'ah court under Islamic law, there are certain conditions he must satisfy.

³⁹² Ibid. Section 271(1).

³⁹³ Ibid. Section 271(2).

³⁹⁴ Buang, A. H. (2007). Op. cite, 5 See also A. Ibrahim, (1989). The Amendment to Article 121 of The Federal Constitution: Its Effect on Administration of Islamic Law, 2 *Malayan Law Journal*, xvii-xxii.

The underlined fact behind the denial of jurisdiction to the Shari'ah Courts in IBF litigations is that the Shari'ah Court Judges and Kadis are considered incompetent to try the modern day litigations on IBF. It was observed that, just as the Shari'ah Court is considered 'incompetent' in matters outside its jurisdiction, the Civil Court is similarly prone to difficulties in deciding matters related to Islamic banking because it lacks the knowledge of the Shari'ah.³⁹⁵

3.7 Qualification and Quality of a Judge in Islam *Vis-À-Vis* the Nigerian Constitutional Position

It is cogent to analyse the requirements for deciding IBF matters, as a judge, under the Shari'ah in order to appreciate the extent of the gap in the constitution.

Islam, as the religion of humanity, attaches great importance to the establishment of justice and the suppression of tyranny.³⁹⁶ One of the fundamental objectives of the Islamic state, according to the Qur'an, is to dispense justice without fear and favour and in fair and equitable manner. The Qur'an emphasizes the fact that one of the basic objectives of Allah in sending the Prophets and revealing the books is 'that the mankind may stand forth in justice'.³⁹⁷ (Qur'an, Hadeed 57: 25)

Justice is the end result of the decision of a just judge. The Qur'an and traditions of the Prophet (PBUH) have, severally, mentioned the importance of justice:

“Lo! Allah commandeth you that ye restore deposits to their owners, and, if ye judge between mankind, that ye judge justly. Lo! Comely is this

³⁹⁵ Buang, A. H. (2007) Op. Cite., 323

³⁹⁶ When Ja'afar Ibn Abdul-Mutallab was sent to Ethiopia by the Prophet as migrant to escape the persecution by the Quraysh, the Quraysh followed them to Ethiopia in order to get them back. The Emperor asked the Muslims to tell him about their religion. Amongst the points raised by Ja'afar was that they were in a state of darkness then Allah brought light, they were in a period when the strong oppresses the weak with impunity then Allah brought the light of Islam.

³⁹⁷ Qur'an, Hadeed 57: 25.

which Allah admonisheth you. Lo! Allah is ever Hearer, Seer.”³⁹⁸(Qur’an, An-Nisa 4:58)

The Qur’an is the manual for human interactions with one another; it provides

“Lo! We reveal unto thee the Scripture with the truth that thou mayst judge between mankind by that which Allah showeth thee. And be not thou a pleader for the treacherous;”³⁹⁹ (Qur’an, An-Nisa 4:105)

Allah enjoins:

“O ye who believe! Be ye staunch in justice, witnesses for Allah, even though it be against yourselves or (your) parents or (your) kindred, whether (the case be of) a rich man or a poor man, for Allah is nearer unto both (than ye are). So follow not passion lest ye lapse (from truth) and if ye lapse or fall away, then lo! Allah is ever informed of what ye do.” (Qur’an, An-Nisa 4:135)

Allah clarifies the need for harmonious co-existence as its absence breeds injustice:

“O ye who believe! Be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo! Allah is informed of what ye do.” (Qur’an, Al-Ma’idah 5:8)

A lot of traditions of the Prophet (PBUH) have discussed the importance of justice and have given warnings on the punishment that awaits a judge that has failed to act justly

³⁹⁸ Qur’an, An-Nisa 4:58.

³⁹⁹ Qur’an, An-Nisa 4:105.

between people. On the authority of Abdullah-bin-Amr and Abu Hurairah the messenger of Allah said:

“When a judge wishes to pass a decree, and then strives hard and decides justly, there are two rewards for him; but when he wishes to pass a decree, and then strives hard but commits mistake, there is one reward for him.”⁴⁰⁰

In yet another tradition, Abu Hurairah reported that the Prophet (PBUH) said:

“A person that is appointed as a judge is like the one that has been slaughtered without a knife.”⁴⁰¹

The Prophet (PBUH) has advised that:

“No judge shall pass a decree between two men while he is angry.”⁴⁰²

The reason is simple, if a person is angry, two things are involved. Firstly, due to the anger, the devil will be in charge of his thinking and due to this, he cannot use his reasoning to do the right thing. In other words, due to the psychological imbalance a responsible and good decision will be least expected from him. Secondly, there could be transfer of aggression. He could be harsh to the person before him due to the heat of passion.

Sayyidina Ali reported:

“The Messenger of Allah sent me to Yemen as a Judge. I said: O Messenger of Allah! You are sending me while I am young in years and I have no knowledge of judgeship. He said: verily Allah will soon give guidance to your heart and make your tongue firm. When two persons come to you for

⁴⁰⁰ *Bukhari*, Volume 9, Hadith Number 470.

⁴⁰¹ Abu Dawud, vol. 3, hadith 3573.

⁴⁰² *Ibid*, vol. 3, hadith 3591.

decision, don't give decree in favour of the first till you hear the argument of the other, because that is more necessary that decision may become clear to you. He said: I had afterwards never entertained any doubt in decisions".⁴⁰³

The above Hadith is similar to the common law doctrine of *Audi alteram partem* (hear the other side). The appointment of Ali despite his confession as to his inexperience does not guarantee the appropriateness of the determining of IBF matters by Judges not trained in the Shari'ah. This is because Ali did not say he was ignorant of the Shari'ah but merely admitted his being a newly appointed judge with little experience on the new job. The latter part of the Hadith has buttressed my point.

In yet another narration, Umm Salamah reported that the Prophet said:

"I am only a man and you bring your disputes before me (for decision). Perhaps some of you may be more eloquent with his arguments than others that I may give decree in his favour according to what I hear from him. Whoso is, therefore, given a decree by me on account of something out of the properties of his brother, he shall not take it; for I am granting him only a portion of fire."⁴⁰⁴

This Hadith tallies with the requirement of professional ethics that lawyers should not suppress justice by eloquence when they know their client is on the wrong.⁴⁰⁵

In Islam, a judge is expected to be just no matter how close he is with a litigant, that party shall not influence the outcome of his decision. The rich or poor, strong or weak

⁴⁰³ Imam Ahmad, hadith no. 1214

⁴⁰⁴ Muslim, vol. 3, hadith 1713.

⁴⁰⁵ Rules of Professional Ethics for Legal Practitioners in Nigeria.

shall be seen as equal. No preferential treatment shall be given to a person. In an authentic tradition, Aisha (RA) reported that verily as for the *Quraish* (the tribe of the prophet S.A.W.), the affair of a woman of *Mukhjumiyyah* tribe, who had stolen, gave them much anxiety. They said: Who will plead for her to the messenger of Allah? They said who will dare it than Osamah, son of Zaid, who is a favourite of the messenger of Allah? Then Osamah pleaded to him. The messenger of Allah said: You plead for a crime out of ordained crimes of Allah! Then he got up and delivered sermon. Afterwards he said:

“Verily those who were before you were destroyed, because when a noble man from them committed theft, they let him off, and when a weak man committed theft from among them, they executed sentence on him. By Allah, had Fatima daughter of Muhammad (PBUH), committed theft, I would have cut off her hand.”⁴⁰⁶

In common law, a judge should transfer any case in which he is interested under the doctrine of *Nemo judex in causa sua* (you cannot be a judge in your own cause.).

Islamic law has for over 1400 years provided for the grand formula on the burden of proof, in both civil and criminal cases, which is used in many parts of the world to date. Under Islamic law, the burden of proof is always on the person that asserts. In civil cases, it is for the plaintiff to prove his case by adducing reliable evidence. In case the plaintiff has no evidence, then the defendant will take the oath of denial.⁴⁰⁷ In the case of criminal trials, the burden of proof is on the prosecution. The prophet was reported to have said:

⁴⁰⁶ Muslim, vol. 3, hadith 1687.

⁴⁰⁷ It is important to mention that the plaintiff must establish a prima facie case or show a relationship that could allow the existence of his claim before the defendant will be subjected to the oath of denial. For example, if the plaintiff and defendant have never met and there is no any relationship either directly or by proxy between them, Islamic law will not allow the plaintiff to unnecessarily subject the plaintiff to physical and psychological stress.

“... Proof is upon the plaintiff and oath is upon the defendant.”⁴⁰⁸

An Islamic judge, or Qadi, is the final arbiter in personal disputes that involve Muslim law. He is a judge who presides over people who profess the Muslim faith and are engaged in disputes over divorce, marriage, guardianship, bequests, inheritance, trusts, maintenance etc.⁴⁰⁹ That is a pointer to the fact that the seat of a judge is a very sensitive, respected and important position in the eyes of the Shari’ah. Ordinarily, Islam prohibits a person to demand others to stand up for him as a mark of respect⁴¹⁰ but in the case of a judge, some scholars permit that. They based their argument on the hadith where the Prophet ordered his companions to stand up as respect for another companion that was invited by the prophet to pass judgment on the Jews that committed treachery. Sayyiduna Abu Said al-Khudri (R.A.) reports:

“When the tribe of Banu Quraiza was ready to accept Said’s (R.A.) judgment, the Messenger of Allah (S.A.W.) sent for him. He came, riding a donkey and when he came near, the Messenger of Allah (S.A.W.) said to the Ansar: "Stand up for your leader". Then Said came and sat beside the Messenger of Allah (S.A.W.).”⁴¹¹

The Qur’an has told us that one of the virtues and blessings which Allah has blessed Suleiman, the son of Daud, with is his ability to use his intellect in doing justice amongst people.⁴¹²

⁴⁰⁸ Tirmizi vol. 3, hadith 1342.

⁴⁰⁹ Sabiq, S., *Fiqhu as-Sunnah*, Beirut: dar al-Kutub al-Arabi: 1973, 54.

⁴¹⁰ Abu Mijlaz (Allah be pleased with him) reports that (once) Muawiya ibn Abi Sufyan entered upon Ibn Zubair and Ibn Amir (Allah be pleased with them both); Ibn Amir stood up whilst Ibn Zubair remained seated. Muawiya (Allah be pleased with him) said to Ibn Amir: Remain seated, for I heard the Messenger of Allah (Allah bless him & give him peace) say: Whosoever likes people to stand up for him should take his abode in the Fire (of Hell). Sunan Abu Dawud, No. 5186, Sunan Tirmizi, No. 5067 & Musnad Ahmad.

⁴¹¹ Sahih al-Bukhari, vol. 4, hadith 279.

⁴¹² In a narration, two women claimed a child. And the issue was brought to prophet Daud who gave the child to the older woman. His son prophet Sulieman held a contrary opinion, he said the child should be cut

On a similar note, the judge is also expected to do his own part of the responsibility by ensuring that he restricts his relation with outsiders especially litigants. He must not engage in trading, he should not frequent the market, he should not borrow from people or allow others to borrow from him and he must also look and dress responsibly.⁴¹³ All these are meant to ensure that the judge maintains his position as impartial umpire. If a judge should be trading in the market and be attending public places, the possibility of his involvement in conflict with people will increase and that may affect his decisions.

As a general rule, the judiciary is responsible for issuing judgments under Islamic law. The responsibilities of a judge are to settle disputes between parties and to prevent anything that could harm the society by way of imposing deterrent penalties, warnings, advice and injunctions.

Judges are divided into three, each of whom has a responsibility peculiar to him. However, for the purpose of smooth operation of the judiciary, there is the need for all the three categories to be present and actively allowed to discharge their functions. These are:

Firstly, *Qadi* (judge) – this is the type of judge that is responsible for the settlement of disputes between people. It is the most common and most important of them. Issues pertaining to the day to day relation between people are settled by the *Qadi*. Hence, cases relating to IBF, crimes, marriage, divorce, maintenance, guardianship, custody and legitimacy come under the *Qadi's* jurisdiction.⁴¹⁴

Secondly, *Muhtasib* (inspector) - He is responsible for settling all matters that are likely to harm the rights of the community. For instances issues affecting environmental

into two and each woman should be given a half. The old woman agreed while the young woman who is the real mother of the child said that instead of killing the child, she agreed to give the child to the old woman. Then Sulieman said she is the real mother of the child because a mother will never agree to the killing of her child.

⁴¹³ Shawkani, M. (1938). *Nayl al-Awtar*. Vol. 2, Cairo, 243.

⁴¹⁴ *Ibid*

pollution, sanitation, maintenance of just measure in the market, *inter alia*, are to be decided by the Muhtasib.⁴¹⁵

Thirdly, *Qadi Mazalim* (Government Investigations Judge) – this type of judge is saddled with the responsibility of settling disputes between the government and individuals. For example issues relating to the acquisition of lands, buildings or infrastructure by the government which may affect the right of private individuals.⁴¹⁶

The authorities to the effect that Qadis are sanctioned by the Prophet himself can be seen from the appointment of Mu'adh Ibn Jabal (R.A.) to Yemen as a Qadi by the Prophet (PBUH). It was narrated that when the Prophet (PBUH) intended to send Mu'adh Ibn Jabal as Qadi to Yemen he asked him "What will you do if a matter is referred to you for judgment?" Mu'adh said: "I will judge according to the Book of Allah." The Prophet asked: "What if you find no solution in the Book of Allah?" Mu'adh said: "Then I will judge by the Sunnah of the Prophet." The Prophet asked: "And what if you do not find it in the Sunnah of the Prophet?" Mu'adh said: "Then I will make Ijtihad/Qiyas (Analogical deduction based on the Quran and Hadith) to formulate my own judgment." The Prophet patted Mu'adh's chest and said "Praise be to Allah who has guided the messenger of His Prophet to that which pleases Him and His Prophet."⁴¹⁷

Under Islamic law, the Qadi assumes that responsibility only if he is sitting in the court. In other words, the Qadi can only pass judgment in a judicial court. This is derived from the hadith, narrated by Abdullah Ibn az-Zubayr, saying that the Messenger of Allah has ordered that the two disputing parties should sit before the judge.⁴¹⁸

⁴¹⁵ Stilt, K., and Mottahedeh, R. (2003). *Public and Private as Viewed through the Work of the Muhtasib*. Social Research, Vol. 70, No. 3, 737.

⁴¹⁶ Lippman, M. (1989). *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*. Boston College International & Comparative Law Review [Vol. XII, No.1, 54.

⁴¹⁷ Abu Dawood, Book 24, Hadith 3585.

⁴¹⁸ Ibid. Hadith 3581.

The rational and wisdom behind this Hadith are that the parties' concurrent appearance indicate their equality before the judge who will then be able to determine their matter. In modern times, in IBF litigations for instance, legal representation could suffice which is permissible by Ijtihad.

A judge under Islamic law must possess the following qualities:

3.7.1 Practicing Muslim

An Islamic judge has to profess and be active in the Muslim faith since the Shari'ah is based on Islamic beliefs. An unbeliever does not have permission to pass judgment over Muslim believers. The Judge exercises religious authority over his fellow Muslims for proper governance within the society. A Muslim must understand this principle, together with the Islamic concept of justice, to be eligible for the position of a Judge.⁴¹⁹ Disbelief is perceived as a great act of injustice towards Allah. A person that has denied the oneness of the one who created and blessed him with all that he is enjoying, by virtue of his being a human being, cannot be expected to be just to others. Prophet Suleiman (A.S.) enjoined his son not to ascribe partner to Allah because that is a great act of injustice.⁴²⁰ (Qur'an, Lukman 31:13)

Before a person becomes a Muslim judge, he must believe in the five pillars of Islam and the six articles of faith. The pillars of Islam include believe in one Allah. The word Allah is an Arabic word, which means the One God. By definition, every Muslim believes in God as the Creator and the Sustainer of all things. Islam holds that God transcends the possession of any physical attributes, and is not bound by any of the limitations of human beings or of anything else. He has no parents, no children,⁴²¹ no associates and no partners.

⁴¹⁹ Lippman, M. Op. Cite., 55.

⁴²⁰ Qur'an, Lukman 31:13.

⁴²¹ This disqualifies Christian Judges from deciding on IBF matters beside the lack of knowledge of the Sharia in most of them. The suggested constitutional amendments considers both these issues.

God is, however, described by His '99 names', such as the Creator, Sustainer, the Merciful, the Light, the law Giver and the Forgiver.⁴²² He describes Himself as such:

“Say, "He is Allah, [who is] One, Allah, the Eternal Refuge. He neither begets nor is born, nor is there to Him any equivalent.” (Qur'an, Ikhlas, 112:1-4)

This chapter of the Quran has clearly shown that Allah is the only true deity. He has no parents; neither does he have children and to Allah do servants turn for assistance.⁴²³

Another verse explains further:

“He is Allah, other than whom there is no deity, Knower of the unseen and the witnessed. He is the Entirely Merciful, the Especially Merciful. He is Allah, other than whom there is no deity, the Sovereign, the Pure, the Perfection, the Bestower of Faith, the Overseer, the Exalted in Might, the Compeller, and the Superior. Exalted is Allah above whatever they associate with Him. He is Allah, the Creator, the Inventor, the Fashioner; to Him belong the best names. Whatever is in the heavens and earth is exalting Him. And He is the Exalted in Might, the Wise.”(Qur'an, Hashr, 59:22-24)

These and indeed several others verses of the Qur'an have shown that Allah is one and the only Creator. A person's identity as Muslim principally rests in his ability to keep his believe in the existence of Allah alone. Even if a person claims he believe in Allah but mix his Islam with disbelief, Allah will not accept his *ibadah* (worship) and he will be considered as a disbeliever:

“And most of them believe not in Allah except while they associate others with Him.”(Qur'an, Yusuf, 12:106)

⁴²² Hussain, A., and El-Alami (2005). *Faith Guides for Higher Education A Guide to Islam*. UK: Centre for Philosophical and Religious Studies, 4.

⁴²³ Ibn Kathir, I., Op. Cite., 122.

The Qur'an revealed that there are idolaters who believe that Allah created them; Allah states:

“And if you asked them who created them, they would surely say, "Allah." So how are they deluded? (Qur'an, Zukhruf, 43:87.)

Imam Tabry stated that they actual know that Allah is their creator but instead of them to worship Him, they directed their worship to the idols and thereby becoming misguided and wrong.⁴²⁴ In fact, the disbelievers even claim that they worship the idol as a linkage to Allah. The Qur'an states unquestionably:

“Allah is the pure religion. And those who take protectors besides Him [say], "We only worship them that they may bring us nearer to Allah in position." Indeed, Allah will judge between them concerning that over which they differ. Indeed, Allah does not guide he who is a liar and [confirmed] disbeliever.” (Qur'an, Zumar 39:3)

Therefore, for a judge to be regarded as a Muslim, he must not only believe in Allah in his heart but must also ensure that he stays away from all acts that will take him out of the fold of Islam like worshipping of idols.

The other leg of the article of faith is to believe in the Prophet Muhammad (PBUH) as a servant and messenger of Allah that was sent as mercy to the universe. Belief in Allah and the Messenger of Allah are inseparable requirement. Any person that claims to believe in Allah and worships Allah but denies the Prophet Muhammad (PBUH) as the messenger of Allah will not be considered as a Muslim. The Qur'an speaks

“And [recall, O People of the Scripture], when Allah took the covenant of the prophets, [saying], "Whatever I give you of the Scripture and wisdom

⁴²⁴ Tabry, M.G. (2000). *Jami'ul Bayan Fi Ta'awil al-Qur'an*, Vol. 24, KSA: Mu'assisatu al-Risalah, 519.

and then there comes to you a messenger confirming what is with you, you [must] believe in him and support him." [Allah] said, "Have you acknowledged and taken upon that My commitment?" They said, "We have acknowledged it." He said, "Then bear witness, and I am with you among the witnesses." (Qur'an, Ali Imaran 3:81).

The Qur'an states further

"O mankind, the Messenger has come to you with the truth from your Lord, so believe; it is better for you. But if you disbelieve – then indeed, to Allah belongs whatever is in the heavens and earth. And ever is Allah Knowing and Wise." (Qur'an, Nisa 4:170.1).

Allah says further:

"Those who follow the Messenger, the unlettered prophet, whom they find written [i.e., mentioned] in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them. So they who have believed in him, honored him, supported him and followed the light which was sent down with him – it is those who will be the successful."

(Qur'an, Anfal 7:157).

Not just believing that he is a Prophet, A Muslim is expected to ensure that he obeys the messenger in all that he ordered and abstain from those things he is asked to abstain. Allah commanded believers to obey the messenger in all their wordings and actions. The Qur'an states:

“Say, [O Muhammad], "If you should love Allah, then follow me,[so] Allah will love you and forgive you your sins. And Allah is Forgiving and Merciful." (Qur'an, Ali Imran, 3:31-32)

The prophet (PBUH) has mentioned in an authentic hadith that Islam is built on five pillars thus; Believe in the oneness of Allah and belief that Muhammad is the messenger of Allah, five daily prayers, arms giving, fast in the month of Ramadan and pilgrimage to Mecca.⁴²⁵

The second pillar of Islam is prayers. A Muslim is expected to pray five times daily.

Allah ordains:

“And when you travel throughout the land, there is no blame upon you for shortening the prayer, [especially] if you fear that those who disbelieve may disrupt [or attack] you. Indeed, the disbelievers are ever to you a clear enemy. And when you [i.e., the commander of an army] are among them and lead them in prayer, let a group of them stand [in prayer] with you and let them carry their arms. And when they have prostrated, let them be [in position] behind you and have the other group come forward which has not [yet] prayed and let them pray with you, taking precaution and carrying their arms. Those who disbelieve wish that you would neglect your weapons and your baggage so they could come down upon you in one [single] attack. But there is no blame upon you, if you are troubled by rain or are ill, for putting down your arms, but take precaution. Indeed, Allah has prepared for the disbelievers a humiliating punishment. And when you have completed the prayer, remember Allah standing, sitting, or [lying] on your sides; but when

⁴²⁵ Muslim, Vol. 1 hadith 16.

you become secure, re-establish [regular] prayers. Indeed, prayer has been decreed upon the believers a decree of specified times.” (Qur’an, Nisa 4:101-103; Qur’an, al-An’am 6:72)

Allah explained how to perform ablution in preparation of the prayers stated above:

“O you who have believed, when you rise to [perform] prayer, wash your faces and your forearms to the elbows and wipe over your heads and wash your feet to the ankles. And if you are in a state of janabah, then purify yourselves. But if you are ill or on a journey or one of you comes from the place of relieving himself or you have contacted women and do not find water, then seek clean earth and wipe over your faces and hands with it. Allah does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful.” (Qur’an, Maaidah 5:6).

Prayer is very strong pillar of the Islamic faith that comes next to the *kalimah shahadah* (statement of accepting Islam). The prophet (PBUH) has in several of his traditions mentioned the importance of prayer in Islam. In one of his narrations, the messenger of Allah mentioned that the first issue to be asked on the day of judgement is prayer, if it is good, all other acts will be accepted by Allah.⁴²⁶ Prayer keeps a servant close to Allah due to the constant interaction (five times) between him and Allah his creator.⁴²⁷ The punishment for a person who denies prayer is death according to Muslim scholars.⁴²⁸ However, if a person believes that prayer is obligatory in Islam but refuses to pray, he will not be tagged as a disbeliever but he is not a practicing Muslim.⁴²⁹ To satisfy the

⁴²⁶ Ibn Majah vol. 2, hadith 4136.

⁴²⁷ Dasuqi, M.A., (nd). *Hashiyatu al-Dasuqi Ala Sharhu al-Kabir*. Vol. 3, Beirut: Daru al-Fikr, nd), 293.

⁴²⁸ Ibid

⁴²⁹ Ibid

requirement of a practicing Muslim for appointment as Shari'ah judge, the individual must therefore be seen praying in congregation with other Muslims regularly.

Fasting in the month of Ramadan is the next pillar of Islam. A person he claims to be a Muslim must fast the month of Ramadan. The Qur'an ordained:

“O you who have believed, decreed upon you is fasting as it was decreed upon those before you that you may become righteous. [Fasting for] a limited number of days. So whoever among you is ill or on a journey [during them] – then an equal number of days [are to be made up]. And upon those who are able [to fast, but with hardship] – a ransom [as substitute] of feeding a poor person [each day]. And whoever volunteers good [i.e., excess] – it is better for him. But to fast is best for you, if you only knew. The month of Ramadan [is that] in which was revealed the Qur'an; a guidance for the people and clear proofs of guidance and criterion. So whoever sights [the new moon of] the month, should fast it.” (Qur'an, Al-Baqarah 2:183-185).

The Prophet (PBUH) equally mentioned that fasting in the month of Ramadan is a blessed months and believers should fast after citing the month of Ramadan and leave the fasting on sighting the moon.⁴³⁰ The fasting could be for 29 or 30 days depending on the sighting of the moon.⁴³¹ According to Muslim scholars fasting is one of the ibadah in Islam in which absolute sincerity works. This is because since it is related to abstinence from eating and drinking, a person can hide and eat or drink with no one knowing except the ever knowing creator. Therefore only belief in Allah that will work with regards to fasting.

The fourth pillar of Islam is the payment of zakat. Zakat is arms that are given by the rich to the need. Before zakat is paid, certain conditions must be fulfilled which includes Islam,

⁴³⁰ Al-Shatibi, I. (1997). *Muwafiqat*, Vol. 1, Daru Ibn Affan, 120.

⁴³¹ Ibid.

keeping the money for a year and nasab. The Qur'an provides with respect to zakat thus: "And establish prayer and give zakah and bow with those who bow [in worship and obedience]." (Qur'an, al-Baqarah, 2:43)

Allah revealed further:

"And [recall] when We took the covenant from the Children of Israel, [enjoining upon them], "Do not worship except Allah; and to parents do good and to relatives, orphans, and the needy. And speak to people good [words] and establish prayer and give zakah:

"Then you turned away, except a few of you, and you were refusing" (Qur'an, al-Baqarah, 2:83; Qur'an, al-Baqarah, 2:110, Qur'an, al-Maidah.(Qur'an al-Anfal).

The Qur'an has mentioned persons that are entitled to be given zakat thus:

"Zakah expenditures are only for the poor and for the needy and for those employed for it and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveler – an obligation [imposed] by Allah. And Allah is Knowing and Wise." (Qur'an, al-Taubah 9:60).

The final pillar is pilgrimage to Mecca. Every Muslim that is able and chanced is obliged to visit Mecca for holy pilgrimage. The pilgrimage is obligatory once in a life time. The Qur'an instructs:

"Indeed, as-safa and al-Marwah are among the symbols of Allah. So whoever makes hajj [pilgrimage] to the House or performs umrah – there is no blame upon him for walking between them. And whoever volunteers well – then indeed, Allah is Appreciative and Knowing." (Qur'an, al-Baqarah, 2:158; Qur'an, al-Baarah 2:196-203).

Allah explains:

“Indeed, the first House [of worship] established for mankind was that at Bakkah [i.e., Makkah] – blessed and a guidance for the worlds.” (Qur’an, Ali-Imran 3:96-97).

The discussed five pillars serve as the foundation and key that allows a person to identify himself as a Muslim. But in addition to the pillars of Islam, a person must believe in the six articles of faith. In a hadith of the Prophet (PBUH) reported by Umar (PBUH) the Prophet mentioned that while they were sitting with the prophet (PBUH) a man appeared to them, who had very white cloth and very dark hair. None of them knew the strange man and there is no sign of a traveler in him. He sat by the Prophet (PBUH) and asked the Prophet several questions. When he asked him about the article of faith, the prophet replied belief in Allah, His angels, His books, His Messengers, belief in the day of judgment and belief in destiny whether positive or negative.⁴³²

The first aspect is the belief in Allah. Believe in the existence of the almighty Creator, the Omnipotent, the Omniscient and Merciful Lord.⁴³³ The second article of *iman* is the belief in the existence of angels. Angels are created by Allah from light. It is important to state that angels under Islamic law cannot be given an image as described under the classical western images of angels in human form with wings and halos, nor with ghosts. However, the Qur’an has stated that they have wings and the number of wings they possess varies.

Allah states:

⁴³² Muslim, vol. 1, hadith 7.

⁴³³ Ibn Rushd. (2007). *Bidayat al-Mujtahid wa Kifayat al-Muqtasid*, Vol. 2, Jamiatu Muhammad Ibn Abdullah., 136.

“[All] praise is [due] to Allah, Creator of the heavens and the earth, [who] made the angels messengers having wings, two or three or four. He increases in creation what He wills. Indeed, Allah is over all things competent.” (Qur’an, Fatir 35:1).

Similarly, unlike human beings that disobey Allah and commit sins, the angels do not commit sins and carry out all instruction given accurately. The Qur’an states:

“O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded.” (Qur’an, Al-tahrim, 66:6).

The leader of the angels is called Jibril (Geibrel). He is the one assigned by Allah to bring down the Qur’an from heaven to Prophet Muhammad (PBUH). (Qur’an, Qadar, 97:1-6).

Angels are given specific roles to play, some are in charge of death, rain, hellfire, paradise etc. only Allah knows the number of angels but they are in great numbers. The Qur’an explains:

“For him [i.e., each one] are successive [angels] before and behind him who protect him by the decree of Allah. Indeed, Allah will not change the condition of a people until they change what is in themselves. And when Allah intends for a people ill, there is no repelling it. And there is not for them besides Him any patron.” (Qur’an, Yunus 13:11).

The third requirement for the article of Iman is the belief in all the books revealed by Allah. Allah has revealed several books to different messengers:

“The taurah, zabur, ingeel (bible) and Qur’an are the books of Allah revealed to His messengers at different times. Indeed, this is in the former scriptures, the scriptures of Abraham and Moses. (Qur’an, al ‘ala 87: 18-19).

“And if only they had upheld [the law of] the Torah, the Gospel, and what has been revealed to them from their Lord [i.e., the Quran], they would have consumed [provision] from above them and from beneath their feet. Among them are a moderate [i.e., acceptable] community, but many of them –evil is that which they do.” (Qur’an, Maaidah, 5:66).

Though the Bible was revealed to Prophet Isa (Jesus), it has now been distorted and changed by the people that came after him. Hence Allah said:

“And [mention] when Jesus, the son of Mary, said, "O Children of Israel, indeed I am the messenger of Allah to you confirming what came before me of the Torah and bringing good tidings of a messenger to come after me, whose name is Ahmad." But when he came to them with clear evidences, they said, "This is obvious magic." (Qur’an, al-Tahrim 61, al-saff: 6).

The Qur’an, as the last book of Allah, has abrogated all the earlier books and its laws. After the revelation of the Qur’an, all believers are enjoined to work with the Qur’an. Allah declares:

“And We have revealed to you, [O Muhammad], the Book [i.e., the Qur’an] in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation [united in religion], but [He intended] to test you in what He has given you; so race to [all that is] good. To Allah is your return all together and He will [then] inform you concerning that over which you used to differ.” (Qur’an, Maaidah, 5:48).

Belief in all the Messengers of Allah is obligatory on all Muslims. A Muslim must believe that all the Messengers were revealed by Allah and there is no discrimination between the messengers. This is suppose to unite Muslims, Jews and Christians. Allah says:

“The Messenger has believed in what was revealed to him from his Lord, and [so have] the believers. All of them have believed in Allah and His angels and His books and His messengers, [saying], "We make no distinction between any of His messengers." And they say, "We hear and we obey. [We seek] Your forgiveness, our Lord, and to You is the [final] destination." (Qur'an, al-Baqarah, 2:285).

The messengers of Allah are in thousands. Some are known while others are unknown. But some are specifically mentioned by the Qur'an:

“And that was Our [conclusive] argument which We gave Abraham against his people. We raise by degrees whom We will. Indeed, your Lord is Wise and Knowing. And We gave to him [i.e., Abraham] Isaac and Jacob – all [of them] We guided. And Noah, We guided before and among his descendants, David and Solomon and Job and Joseph and Moses and Aaron. Thus do We reward the doers of good. And Zechariah and John and Jesus and Elias – and all were of the righteous. And Ishmael and Elisha and Jonah and Lot – and all [of them] We preferred over the worlds.” (Qur'an, An'am 6:83-86).

Belief in the Day of Judgment is equally a fundamental requirement of the article of *iman*. A Muslim is expected to believe that after death Allah will raise all creatures and judge them according to their actions. Those who fear Allah and obey his commandment will be rewarded with paradise and those who disobey him will be punished with hellfire. The Qur'an warns:

“And fear a Day when you will be returned to Allah. Then every soul will be compensated for what it earned, and they will not be wronged (i.e., treated unjustly).”(Qur’an, al-Baqarah, 2:281).

Allah directs:

“O you, who have believed, fear Allah. And let every soul look to what it has put forth for tomorrow – and fear Allah. Indeed, Allah is acquainted with what you do.” (Qur’an, al-Hashr 59:18).

The final and last article is the belief in destiny whether positive or negative. A person is expected to believe that anything good that comes to him is as a result of *qadr* (predestination) of Allah. Similarly, if any calamity befalls him, he should be patient and acknowledge the fact that Allah has already destined that such a calamity will happen to him.⁴³⁴

After believing in all the above and acting accordingly, a true practicing Muslim is expected to stay away from all the major sins and as well try to avoid the minor ones. If that is achieved, then a person can be described as a practicing Muslim and hence qualified to be appointed as a judge under the Shari’ah.

The germane question here is that, what is the current position of this prerequisite as both Muslim and non-Muslim judges and justices handle IBF matters? This is the more reason why some of our laws in Nigeria need amendments.

3.7.2 Sane

The Judge must be sane if he is to make clear decisions that bind the disputing parties. According to Islamic law, it is not allowed for a person who is insane, mentally challenged

⁴³⁴ Ibn Rushd. Op.Cit.

or whose judgment is impaired on account of old age or sickness to become a Judge. The rationale is that such a person cannot determine the matter at hand with clarity and solve the difficult problems that arise in the type of disputes the Islamic Judge handles. Furthermore, such a person cannot be held legally accountable for his actions and as such his decisions cannot be binding. Therefore, sanity is a mandatory requirement for the position.⁴³⁵ The Prophet stated in his tradition that the pen of writing good and bad is raised on three persons thus: the child until he attains maturity, the sleeping person until he wakes up and the insane person until he gains his senses.⁴³⁶

3.7.3 Mature

Maturity is a necessary attribute of an Islamic judge because the matters he handles are sensitive and require deep insight and perception about the human condition. Consequently, a candidate for the position of Islamic Judge cannot be a child since he does not have authority even over himself and could not command the respect of the disputing parties or the society. Nevertheless, the candidate does not have to be advanced in years, provided he can render high quality decisions arrived at after careful consideration of the evidence and the relevant Shari'ah law.⁴³⁷

Shari'ah has not fixed a particular period in the life of a human being as the line of demarcation between immaturity and maturity.⁴³⁸ A child can be described as a human being who has not attained the age of puberty.⁴³⁹ It can equally be defined as the biological or psychological phase of life somewhere between infancy and

⁴³⁵ Lippman, M., Op. Cite., 55.

⁴³⁶ Abu Dawud, vol. 4, hadith 4400.

⁴³⁷ <http://work.chron.com/qualities-islamic-judge-21269.html> Retrieved December 21, 2013

⁴³⁸ Mohd, A., (2008). *Protection and Adoption of Abandoned Children in Malaysia: A Comparative Overview with Islamic Law*, Selangor: International Law Book Services, 198.

⁴³⁹ Salwan, S.L., & Narang, U. (2007). *Academic's Legal Dictionary* India: Academics (India) Publishers, 69.

adulthood.⁴⁴⁰ Under the Shari'ah, the Qur'an and Sunnah did not give any particular age for maturity. In fact the Holy Qur'an mentioned attainment of adulthood in various contexts but did not state the actual age. The Qur'an states "O you who have believed, let those whom your right hands possess and those who have not [yet] reached puberty among you ask permission of you [before entering] at three times:..."⁴⁴¹ in yet another verse Allah says "And when the children among you reach puberty, let them ask permission [at all times] as those before them have done. Thus does Allah make clear to you His verses; and Allah is Knowing and Wise."⁴⁴²

A fact that is well established under the Shari'ah is that a person is a child under the Shari'ah if he has not attained adulthood.⁴⁴³ That been the case, the determinant factor for adulthood under the Shari'ah is the attainment of adulthood and not by any specific age.⁴⁴⁴ Some jurists opined that adulthood in Islam can be defined to mean the attainment of the age of marriage.⁴⁴⁵ Reliance was put by these scholars on the instruction of Allah that the property of orphans shall not be surrendered to them until they attain marriageable age:

"And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them." (Qur'an, an-Nisa 4:19)

The Qur'an has mentioned attainment of adulthood in various contexts thus:

⁴⁴⁰ Kaime, T., (2009). *The African Charter on the Rights and Welfare of the Child-a Socio-Legal Perspective*. Cape Town: Pretoria University Law Press, 65.

⁴⁴¹ Qur'an, Nur 24: 58.

⁴⁴² Qur'an, Nur 24: 59.

⁴⁴³ The Glorious Qur'an has used various terms to represent children such as "dhurriya, ghulam, Ibn, walad, walid, mawlud, sabi, tiftl and saghir" however the context in which the term is used makes it clear whether it is referring to immature.

⁴⁴⁴ Alemika E. O. et al (2005). *Sharia Penal Code in Northern Nigeria*, edited by, Kaduna: Human Rights Monitors, 173.

⁴⁴⁵ Ambali, M. A., (2003). *The Practice of Muslim Family Law in Nigeria*, 2nd ed., Zaria: Tamaza Publishing Company Ltd, 2003, 147.

“O you who have believed, let those whom your right hands possess and those who have not [yet] reached puberty among you ask permission of you [before entering] at three times...”(Qur’an, Nur 24: 58).

The Qur’an guides:

“And when the children among you reach puberty, let them ask permission [at all times] as those before them have done. Thus does Allah make clear to you His verses; and Allah is Knowing and Wise.” (Qur’an, Nur 24: 59).

Muslim jurists are not unanimous on the age of attainment of adulthood. Some jurists opined that with respect to males, maturity is determined by onset of wet dream, change or hoarseness of voice or growth of pubic hair.⁴⁴⁶ In the case of females, maturity is determined by menstruation, pregnancy, onset of wet dream or growth of pubic hair.⁴⁴⁷ In the absence of these signs, adulthood will then be determined through age of the individual though they are equally not unanimous as to what age shall be the age of maturity.⁴⁴⁸ Accordingly, the Maliki School of thought opined that maturity is presumed upon reaching the age of 15 for both sexes.⁴⁴⁹ Whereas the Hanafi School of jurisprudence opined that puberty for boys is on attaining 18 years and 17 years for girls.⁴⁵⁰ While the Shafii and Hanbali jurists set the age of maturity for both boys and girls at 15 years.⁴⁵¹ On the other

⁴⁴⁶ Badamasiuy, J. (2009). *Obligations and Rights of the Parents Under the Child’s Right Act: A Sharia Perspective*, Kaduna: Zakara Communications Limited, 8.

⁴⁴⁷ Ibid

⁴⁴⁸ Ibid

⁴⁴⁹ A child has been defined under the Maliki School as any person that has not witnessed wet dream and neither has he grown pubic hair. Dasuqi, M.A., (nd). *Hishiyatu al-Dasuqi Ala Sharhu al-Kabir* Vol. 3, Beirut: Daru al-Fikr, nd 293.

⁴⁵⁰ Jamhud, M.S., (2010) *Himayatu Huquq al-Tiflu*, Iskandariyyah: Daru Fikri al-Jami’I, 24.

⁴⁵¹ Basil M., (2008). *Al-Hafi, Fiqh al-Tufulah*, Syria: Dar al-Nawadir, 423.

hand, Shi'a jurists of the Imamia School opined that 15 years is the age of maturity for males and 9 years for females.⁴⁵²

In the case of *Yadoma v Fulata*⁴⁵³ the Shari'ah court applied the Maliki view in defining a child. According to the Shari'ah court under the Maliki School of Islamic law, maturity for a girl is determined by monthly courses and in the case of a boy by experiencing wet dream. Where neither situation happens, maturity will be presumed by attaining the age of 15 years for both sexes.

A very important point worthy of mention is the fact that circumstances such as environment, climatic condition, nutrition, adequate or insufficient medical care and sometimes the physical uniqueness of the child's body play significant role in the attainment of adulthood.⁴⁵⁴

Unlike what is obtainable under Islamic law where the principal way of determining maturity is by physical signs and not by age, the Nigerian law provided for specific age for the attainment of maturity. According to the Child's Rights Act (CRA) 2003 a child is a person who has not attained the age of 18 years.⁴⁵⁵ The African Charter on the Rights and Welfare the Child⁴⁵⁶ also defines a child as a human being below the age of 18 years.⁴⁵⁷ Similarly, the United Nations Convention on the Rights of the Child 1989 defined a child to mean a human being below the age of 18 years⁴⁵⁸ though Convention allows a window for countries to prescribe an age for a child according to their national laws.⁴⁵⁹

⁴⁵² Ladan, M.T. (2008). *Introduction To Jurisprudence: Classic and Islamic*. Lagos: Malthouse Press Ltd, 321.

⁴⁵³ (1970) NSNLR at p10, also cited in (1961-1989) SLRN Vol. 1 p24

⁴⁵⁴ Joseph, S. and Nagbamadi, A. (2003). *Encyclopedia of Women and Islamic Culture*, Vol. 3 California: Brill, 69.

⁴⁵⁵ Section 277 of the Child's Rights Act.

⁴⁵⁶ Adopted in Addis Ababa, Ethiopia on July 1990 and entered into force on 29th November 1999.

⁴⁵⁷ Article 2, CRA, 2003.

⁴⁵⁸ Ibid. Article 1

⁴⁵⁹ Ibid

Though the Nigerian Constitution did not define a child expressly, it has however prescribed 18 years as the age of voting.⁴⁶⁰ This by extension means that any person who has not attained 18 years which is the age of maturity under other laws in Nigeria cannot vote. According to the Children and Young Person's Act⁴⁶¹ "a "child" means a person under the age of fourteen years, while "young person" means a person who has attained the age of fourteen years and is under the age of seventeen years."⁴⁶² The Marriage Act on the other hand fixed the age of maturity at the age of 21 years.⁴⁶³ Further, the Immigration Act stipulates that any person below 16 years is a minor,⁴⁶⁴ whereas the Matrimonial Causes Rules puts the age of majority at 21.⁴⁶⁵

The position of common law is at variance with Islamic law, under the Common Law; the age of adulthood is 21 years. Hence, a person that is less than 21 years of age is deemed to be a child under the common law.⁴⁶⁶ In the case of *Labinjo v Abake*⁴⁶⁷ the court declared that the age of maturity is 21 years under the common law. Similarly, in *Solo v State*⁴⁶⁸ the court defined a child as a person who has not attained the age of 14 years by virtue of section 2(1) of the Criminal Procedure law of Ogun State. Read opined that any one is a minor who is under 18 years of age.⁴⁶⁹

3.7.4 Learned Scholar

⁴⁶⁰ Section 29 CFRN which provides that "full age means 18 years and above..." Section 2 of the Electoral act equally stipulates 18 years as the age of voting.

⁴⁶¹ Enacted in Eastern, Western and Northern Regions of Nigeria.

⁴⁶² Article 2 of the Children and Young Persons Act.

⁴⁶³ Section 48 of the Marriage Act cap C 218 Laws of the Federation of Nigeria 1990. See also section 18 of the Act.

⁴⁶⁴ Section 37(1) of the Immigration Act 1963, CAP II LFN 2004.

⁴⁶⁵ Order 1 Rule 4 of the Matrimonial Causes Act 1970, CAP M7, LFN 2004.

⁴⁶⁶ Sagay, I.E. (1993). *Nigerian Law of Contract*. Ibadan: Spectrum Books Limited, 475.

⁴⁶⁷ (1924) 5 NLR 330 p328

⁴⁶⁸ (2005) 2 NWLR Part 937 p. 460; *Onyegbu V State* (1994) 1 NWLR Part 32.

⁴⁶⁹ Read, P.A. (1990). *Law of Contract* London: HTL Publications, 60.

The importance of education in Islam needs not be over emphasized; The Qur'an and traditions of the prophet (S.A.W.) have mentioned the virtues of education in many places. The Qur'an states to the effect that:

“And those who believed and whose descendants followed them in faith – We will join with them their descendants, and We will not deprive them of anything of their deeds. Every person, for what he earned, is retained.”(Qur'an: Tur: 21).⁴⁷⁰

In a similar vein, the Prophet (S.A.W.) states that: "Upon death, man's deeds will (definitely) stop except for three deeds, namely: a continuous charitable fund, endowment or goodwill; knowledge left for people to benefit from; and pious righteous and God-fearing child who continuously prays Allah, the Almighty, for the soul of his parents."⁴⁷¹

Since Shari'ah law is the applicable law in the Islamic Judiciary, the Judge must be well acquainted with its sources and principles. The Islamic Judge is mainly guided by the Qur'an which is the Muslim Holy Book and Sunnah that is the normative way of life prescribed for Muslims and based on the teachings and practices of Prophet Muhammad (PBUH). However, there are other sources of law such as traditions of other prophets, community consensus after the public pronouncement of a judgment and analogies to existing laws when handling newly emerging issues. The Judge should then know how to appropriately apply the various Islamic principles to the situations brought before him⁴⁷²

There is no consensus among Muslims scholars as to whether a woman is qualified to be a judge or not. Some opined that if she has all the requirements, there is no harm in a woman becoming a judge since no authority has prohibited that.⁴⁷³ Others opined that she

⁴⁷⁰ Qur'an: Tur: 21.

⁴⁷¹ Muslim, M., Vol. 3, hadith 1376 and Tirmithi, M., Vol. 3, hadith 1376

⁴⁷² Doi, A. I. Op.Cit.

⁴⁷³ Ali, Md Y. (2011). *The Appointment of Muslim Women as Judges in the Courts: A Textual Analysis from Islamic Perspective*, Vol. 17 IPEDR, 201.

could be a judge in civil cases and not in criminal cases because even in testimony, the evidence of one woman is not accepted in criminal cases.⁴⁷⁴ While others opined that a woman cannot be a judge basing their opinion on the hadith which states that any nation that places its affairs in the hands of a woman will not prosper.⁴⁷⁵ However, since the Quran, the law superior to the Hadith, provides that the best of mankind is the one best in the fear of Allah irrespective of sex, tribe and nationality, pious women could be judges under the Shari'ah. Accordingly, there should be no issue over women judges presiding over as judges in IBF matters if they are learned in, not only family law but, in the whole of the Shari'ah.

The position of a judge is very sensitive and delicate in the eyes of the Shari'ah. To that effect Islam requires that qualified person must be appointed to man the seat. In dispensing justice, a judge is expected to have the fear of Allah and have at the back of his mind that the Almighty will question him on the Day of Judgment on how he acted as a judge. To ensure impartiality in his decisions, a judge is expected to be reserved and ensure he does not relate with people the manner a politician will want to relate and mingle with the public.

3.8 The Proactive Proposals for the Amendment to the Constitution

The proposals (Appendix D) are proactive as it forestalls future constitutional hindrances to the smooth operation of this enormous tool for inter-faith harmony, IBF. After all, Section 15 (1) states that the motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress; therefore IBF should be legally and constitutionally fortified and buttressed as it is proved as a tool for achieving same as it entails economic and scriptural harmony. Furthermore, Section 16 (1) (d) provides that Government should, without prejudice to the right of any person to participate in areas of the economy within

⁴⁷⁴ Ibid at 202

⁴⁷⁵ Bukhari, Hadith 4425

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. This is in line with the fact that IBF is open to all irrespective of religious or other affiliations. The diagnosis of sections with lacunae and their hypothesised legal remedy are as follows:

Section 38(1) enshrines the right to freedom of thought, conscience and religion:

“(1) every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.”

Avoiding what your religion prohibits is a cardinal principle of “worship” in religions. Equally, doing what is enjoined by ones religion is “practice and observance” of one’s religious right. This can be buttressed by the fact that IBF was introduced in Malaysia in 1983 based on the religious freedom guaranteed by Malaysian constitution.⁴⁷⁶ It should also be noted that:

“Respect for these rights is an international obligation on Nigerians and the Nigerian government, and that the rights that pertain to Nigerians are not limited to those contained in the constitution but also the African charter on human and peoples’ rights, and other international human rights instruments.”⁴⁷⁷

There should be added the phrase “business transactions” to Section 38 (1) in order to clearly include IBF transactions. It should read:

⁴⁷⁶ Ibid, 319

⁴⁷⁷ Mowoe, K. (2003) Op. Cite.

“...to manifest and propagate his religion or belief in worship, teaching, practice, business transactions and observance.”

Section 40 provides:

“Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests”

The reality that the membership of the Shari’ah Advisory Council of the CBN is based on the knowledge of the Shari’ah has been challenged as contrary to this provision in the sense that only Muslims can be members and therefore the rights of the non-Muslims to be members of any association is infringed. This argument cannot stand because anybody with knowledge of the Shari’ah can be a member irrespective of his believe as seen in the membership of such committees in the IBF institutions in non-Muslim nations. However, there is a gap in this provision as it is silent on qualifications for membership. Sub-section (1) needs to be added to read:

“Nothing in this section should qualify any person to be a member of any association, council, board or similar legal bodies unless the person acquires any qualification requirement stipulated for its members.”

Section 42 requires similar amendment as it is also used to challenge membership of the Shari’ah Advisory experts’ board of the CBN. The section provides for the right to freedom from discrimination.

Section 1(1) (3) provides on the supremacy of the constitution over the Qur’an and the Bible:

“If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.”

There is the need for a proviso to this provision to respect the scriptures guiding the entire activities and livelihood of majority of Nigerian who are either Muslims or Christians. It is impolite to frankly derogate the Quran and Bible. A proviso should provide thus:

‘Provided that no provision of the Qur’an or the Bible which directly affects worship is made void by this provision’

With this exception, IBF operations cannot be hindered by any allegations of unconstitutionality so far as it operates according to the scriptures.

Section 45 provides for the restriction on and derogation from fundamental human rights including that of freedom of religion in emergency situations. To avoid misuse of this power by a possible religiously sentimental President, a proviso should be added to this section to empower the Judiciary to check the misuse which may hinder IBF operations.

Section 6 vests judicial powers on the Courts which are to interpret laws. The role of the Shari’ah Advisory Council in the CBN was seen as tantamount to exercising judicial powers and therefore in conflict with the constitution. This is not so because their role is merely advisory; advising the banks through interpretation of the Shari’ah on compliance issues.

A proviso can be provided to clarify the situation.

Section 4 provides for Legislative powers. The question was asked, are the Shari’ah Advisory Councils of the CBN and other Banks mini-legislatures? They are not in any way assuming this constitutional power for the reason stated above on section 6. A proviso or

a sub-section can be added to clarify the issue to forestall future obstacles to the operation of the worthwhile council.

Section 4 (8) provides that the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law (including the jurisdiction of FHC to handle IBF matters). There is no need to oust the jurisdiction of the FHC; all what is needed is to appoint Muslim judges learned in General Islamic law in the court in addition to vesting such powers on the Shari'ah Courts. If that is not feasible, then, Section 4 (8) should be clarified by adding the phrase "except through amendments."

Section 9 provides for the Mode of altering provisions of the constitution which is very rigorous, requiring two thirds of the National Assembly in addition to two thirds of the states' houses of Assembly. This should be relaxed to one third in matters relating to the enhancement of national harmony like IBF.

That is why this research suggested the setting up of special courts or tribunals to handle IBF matters in addition to ADR bodies with powers to enforce their decisions as practiced in Dubai.

Section 10 Prohibits State Religion. There are arguments that the establishment of IBF amounts to Islamising Nigeria and therefore unconstitutional. This argument cannot be sustained because the system currently operates in non-Muslim nations and nothing in the laws establishing it seem to create any state religion. A proviso to this section is required to the effect that establishing religion based institutions do not constitute making state religion.

Section 231(3) provides for the qualification of the Chief Justice and Justices of the Supreme Court (SC). This section should be amended to replace the phrase "Islamic

personal law” with ‘Islamic law’ so that Justices learned in IBF will be appointed to properly handle such matters.

Section 232 and 233 enshrine the original and appellate jurisdictions of the Supreme Court. This should also be amended to include matters of IBF.

Section 238(3) stipulates the qualification of Justices of the Federal Court of Appeal (FCA). Same suggestion as that of the SC justices; they should be learned in Islamic law, not just personal law.

Section 239 and 240: Original and appellate jurisdictions of the Federal Court of Appeal. Same suggestion as that of the SC justices; they should be learned in Islamic law, not just personal law.

Section 244(1) provides for appeals from State Shari’ah Courts of Appeal to the Federal Court of Appeal. This should be amended to include Islamic law in general including IBF laws.

Section 244(2) (b) provides for FCA procedure in Shari’ah matters. This should be amended to add Shari’ah law procedures other than personal law.

Section 247(1) states that to determine appeals from the SCA (Shari’ah Court of Appeal) the FCA Panel consist of not less than three Justices of the Court of Appeal learned in Islamic personal law. The word ‘personal’ has to be removed so that it should read ‘Islamic Law’.

Section 251(1) (d) vests exclusive Jurisdiction on the FHC on matters relating to Banks and other financial institutions (like *takaful* companies); except between a Bank and a human individual. This is the most controversial provision as it arrogated the jurisdiction on banking and finance matters to only the FHC. It should be amended to include a proviso:

“Provided that this section does not prevent the vesting of jurisdiction to determine Islamic Banking and Finance related Civil and Criminal cases by any other court.”

Section 251(1) (j) provides Exclusive FHC Jurisdiction on matters relating to bankruptcy and insolvency (even if individuals are involved). This should also have the same amendment as Section 251(1) (j).

Sections 256(3) and 271(3) enshrine for the qualifications of Judges of HC of the Federal Capital Territory, Abuja and state HC. Since Judges of these courts determine matters of IBF between individuals and banks, there should be the Malaysian type Shari’ah Panel. Members of this panel must be learned in the Shari’ah generally. This should be achieved through amendment of this provision.

Section 261 (3) covers the qualification for Kadis of the SCA of Abuja: As modern IBF matters entail both the Shari’ah and Civil law, there ‘or’ in the provision should be changed to ‘and.’ As controversial as it could be a person should not qualify to be a Kadi just because he is an Islamic scholar without being a lawyer. This will upgrade the Shari’ah Courts and would no longer be despised by the HC judges.

Section 262 (1) says Jurisdiction of the SCA Abuja can be increased by the National Assembly: there should be an amendment which should clearly state that the increase is not only on personal law but Islamic law generally. Same applies to the provision on the jurisdiction of the state SCA.

Section 262 (2): appellate Jurisdiction of SCA Abuja on civil, Islamic personal law matters (excluding IBF matters). The court should have both original and appellate jurisdiction to determine IBF matters. Same should apply to the state SCA.

Sections 264 and 279: powers of Grand Kadis of Abuja and the states, respectively, to make rules for regulating the practice and procedure of their courts. This should be reviewed to reflect the addition original and appellate jurisdictions to try IBF matters.

Section 288 (1) and (2) (a) assert that President shall have regard to the need to ensure that there are among the holders of the offices of Justices of FCA and the SC, persons learned in Islamic personal law (note: only personal law)

By virtue of Section 4, and since the CBN Act, BOFIA and Insurance Act are products of this constitutional provision, the National assembly should, put economic and religious sentiments aside and, have the political will to amend the constitution and all the other relevant laws for the smooth operations of IBF in Nigeria.

3.9 Chapter Conclusion

IBF in Nigeria is indeed a child of necessity to Nigerian Muslims in view of the fact that the conventional banking and finance system uses *Riba* and other unIslamic business practices. There is the need for legal transformation in this sector just as the need for change as exemplified by the rejection of the modern property management model based on trust and will by Islamic *fara'id* rules in Malaysia.⁴⁷⁸ In view of the fact that the system comes with numerous benefits, it is expected that when it was approved by the CBN, Nigerians regardless of their religious inclination will embrace and welcome it. Unfortunately, the Christian Association of Nigeria was quick to express its rejection of the Islamic banking though that was not the view of the majority of the Nigerian Christians who bought shares from the newly established Islamic bank. A Federal High Court equally gave a blow to the newly established Islamic bank by stating that it would have revoked the license of the Islamic bank if the plaintiff in the case had the *locus standi* to institute

⁴⁷⁸ Buang, A. H. (2008). Appreciation of Shariah Principles in Property Management in Contemporary Malaysia, *Jurnal Syariah*, Vol.16, *Special Issue*, 555-566, 555.

the action. Several authors discussed these and other issues relating to Islamic banking in Nigeria but did not discuss the constitutional lacuna and the remedy in the Islamic banking system in Nigeria. This work, therefore, adds to knowledge by discussing the gaps in the Constitution and the use of ADR as an alternative to litigation in cases relating to IBF in Nigeria. It also discussed and found solution to the issues raised in Jaiz Bank case regarding the powers of the CBN governor to issue IBF license as contained in BOFIA.

From the foregoing analyses of the Nigerian laws regulating the I.B.F. mechanism, it is established that a reliable legal framework has been laid as foundation for a promising and rapidly growing IBF system in Nigeria. The question of whether or not IBF is a constitutional right of the Nigerian 55% Muslims has been cleared to the extent that, it is even the religious right of the Christians as well as their religion also forbid *Riba* (this is analysed in detail in chapter four). However, there is the need for a *Lex mercatoria* (special legislation for commerce) regarding IBF to streamline its operation *vis-à-vis* the modernization and globalization of the system.⁴⁷⁹

In the whole, the panacea to these constitutional lacunae, beside the suggested amendments, enactments and ADR intervention, lies in an international conference in Nigeria that would lead to a research for the general amendment of the constitution and Islamic law in Nigeria to tally with current global social, economic and political developments. This, of course, is without tempering with the immutable provisions of the Quran and the Hadith.

⁴⁷⁹ Yaacob, H. (2014) *Towards Our Own Lex Mercatoria: A Need for Legal Consensus in Islamic Finance* Pertanika J. Soc. Sci. & Hum. 22 (S): 1 - 270, 258.

CHAPTER 4:

THE IMPLICATION OF RELIGIOUS FOUNDATION OF IBF IN NIGERIA: TOWARDS CONVERTING NATIONAL DISHARMONY TO HARMONY

4.1 Chapter Introduction

Nigeria had experienced social and political turmoil since its independence; some bordering on religion while others on other reasons. When IBF came up in Nigeria, the Christian Association of Nigeria (CAN) was quick to unleash its rejection and displeasure over the moves.⁴⁸⁰ It claimed that its introduction was a deliberate attempt by the Muslims to Islamize Nigeria. It unfortunately turned its eyes away from the fact that several non-Muslim countries have embraced it and have been enjoying its fruits. This move was seen by the Muslims in Nigeria as an attempt to deny their constitutional right to worship. According to the Muslims, usury and gambling, which are elements of the conventional banking and finance system, are unlawful under the Shari'ah; they are, therefore, obliged to stay away from them.⁴⁸¹ The denial of the system is seen as tantamount to the denial of the constitutional right to religion.⁴⁸²

Though the name is IBF, its products and services remain open to people of all religions and indeed participate in its operations.⁴⁸³ Interestingly, as stated earlier, majority of the shareholders in the Jaiz Bank in Nigeria are non-Muslims. It is the only fully fledged IB in the country. This is to show that the view of the CAN does not represent the view of the majority of the positive minded Christians who believe in unity and respect for the right of the Muslims. This chapter therefore discussed the Muslim-Christian debate on the subject in Nigeria with a view to positively contribute in the debate on the legality of the system

⁴⁸⁰ Chikezie, E.P. (2014), Islamic Banking in Nigeria: Perceived Relative Advantage among Religious Groups in Anambra State. *An International Multidisciplinary Journal, Ethiopia*, Vol. 8 (2), 33, 162.

⁴⁸¹ Alkali, A.U. (2014) Op. Cite., 320.

⁴⁸² Section 38 CFRN.

⁴⁸³ Alkali, A.U. (2014). Op. Cite, 294.

and harmonising the duo. In doing so, the chapter also looked at the operations of the system globally to prove its acceptance across nations and religious inclinations. This proves that it is untenable to argue that the operation of IBF in Nigeria is tantamount to Islamising the country.

God's Laws, as contained in the Scriptures, form the nucleus of society. They are therefore a veritable social mechanism for enhancing Christian-Muslim partnership. This is especially true in economic relationships, such as banking and finance in the pluralist society of Nigeria; as Islamic Banking and Finance (IBF) is now accepted in non-Muslim nations worldwide.⁴⁸⁴

The concurring provisions of the Quran, Old Testament and the Bible were, as well, resorted to as a buttress for this thesis's objective to harmonise the Nigerian citizenry using IBF as a tool.

4.2 The Debate on the Legality of IBF in Nigeria:

4.2.1 The Stand of the Christian Association of Nigeria (CAN) on IBF

CAN (Christian Association of Nigeria) came into being on August 27, 1976; the Association principally aims to protect the interest of Christians in Nigeria. When it started, it was mainly handled by Christians of the Catholic denomination. However, presently, the Catholics are not spear heading the affairs of the Association. In fact, the Catholics have temporarily backed out of the Association due to internal conflict in the group.⁴⁸⁵

⁴⁸⁴ Alkali, M. B., & Buang, A. H. (2015). Challenges in Implementing Islamic Banking and Finance in Nigeria: A Legal Insight. *Shariah Journal*. Vol. 23, No. 1, 1.

⁴⁸⁵ Catholic Bishops of Nigeria, "Why We Pulled Out of CAN", Premium Times News Paper of 24th January, 2013.

CAN is the umbrella body for all Christian Churches with distinct identities, recognisable Church structures and a system of worship.⁴⁸⁶ The association was able to bring unity among the various churches in Nigeria. Sundkler and Steed stated that

“For centuries the two competing confessions, Catholic and Protestants, treated one another with damning silence—plodding along on different sides of the same hill or river, relying on the same vernacular related to the same traditional African religion, dealing with similar daily experiences in the district in hot season and rainy season—yet never meeting. The other party did not or should not exist.”⁴⁸⁷

The Decree on Ecumenism has equally helped in the formation of this association. This is because it brought unity between the Catholics and other Christian denominations.

According to the Decree:

“The concern for restoring unity involves the whole Church, faithful and clergy alike. It extends to everyone, according to the talents of each, whether it is exercised in daily Christian living or in theological and historical studies. The concern itself already reveals to some extent the bond of brotherhood existing among all Christians, and it leads toward full and perfect unity, in accordance with what God in his kindness wills . . . there can be no ecumenism worthy of the name without interior conversion. For it is from newness of attitudes of mind (cf. Eph. 4:23) from self-denial and unstinted love, that desires of unity take their rise and develop in a mature way. We should therefore pray to the Holy Spirit for the grace to be

⁴⁸⁶ Ibrahim, J., (1991). Religion and Political Turbulence in Nigeria. *The Journal of Modern African Studies*, Vol. 29, No. 1. 120.

⁴⁸⁷ Sundkler, B., & Steed, C., (2000). *A History of the Church in Africa*. Cambridge: Cambridge University Press, 5.

genuinely self-denying, humble, and gentle in the service of others and to have an attitude of brotherly generosity toward them.”⁴⁸⁸

The above discussion is to demonstrate the disunity even among the Christians themselves, talk less of easily accepting IBF. Accordingly, it did not come as a surprise for CAN to complain when the Governor of Central Bank of Nigeria announced on Monday June 20, 2011, at a Conference on Islamic Banking in Dakar, Senegal, that it had issued Jaiz International Bank PLC an Approval in-Principle, as the first fully pledged Islamic Bank in the country. He had earlier, in January 13, 2011, approved for the Bank to carry on business as a Profit and Loss Sharing Bank and issued a Framework on Non-Interest Financial Institutions (NIFI). The bank was approved by the National legislature and has a 60% non-Muslim patronage (shareholders). The government approved the establishment of IBF after the CBN Governor, Sanusi, convinced the parliament and the finance Minister that non-Muslims are also free to interact with the bank as exemplified by USA and Britain.⁴⁸⁹ Some objective clergy men of the two faiths are also partaking in this all important awareness campaign.⁴⁹⁰

The unequivocal denouncement of IBF by CAN was based on the premise that the introduction of IB is an attempt to Islamize Nigeria.⁴⁹¹ This sort of criticism is not new. CAN is known to criticize several matters relating to Islam. For example the introduction of Shari’ah criminal law by some Muslim states in the country. They rely on the constitutional provision which states that no state shall declare any religion as state religion in Nigeria.⁴⁹²

⁴⁸⁸ Tanko, B.P. (11991). *The Christian Association of Nigeria and the Challenge of the Ecumenical Imperative*. Rome: N. Domenici-Pecheux, 60.

⁴⁸⁹ Sanusi, L. S. Op. Cit. Hassan,

⁴⁹⁰ Voice of America Hausa Radio interview of two Christian and Muslim Nigerian clergy men on unity (<http://www.voanews.com/mp3/voa/africa/haus/haus2030a.mp3>) Aired on Saturday 26, 2014.

⁴⁹¹ Chikezie, E.P. (2014) Op. Cite., 160.

⁴⁹² Section 10 CFRN 1999.

According to the Anglican Bishop of Enugu, Rt. Emmanuel Chukwuma, CBN is not constitutionally empowered to grant license to the establishment of any Islamic Bank. As reported by Nkwopara, Rt. Rev. Geoffrey Chukwunenye and Ven. H. U Nnaoma signed a 14-point communiqué alluding that the action of the CBN Governor is contrary to Section 10 of the Constitution and an infringement of human right. They attempted to justify their position by citing Section 39 (1) of BOFIA 1991 which prohibits the inclusion of the name of any religion by any Bank. This provision led to the removal of the word ‘Shari’ah’ in the Draft Framework for the regulation of Non-Interest Banks (NIBs) in Nigeria issued by the CBN. Section 10 of the 1999 Nigerian Constitution provides:

“The Government of the Federation or of a State shall not adopt any religion as a State Religion.” Section 16 1(d) provides: “Without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.”

A group called ‘Apostle in the Market Place’ was of the view that the Central Bank of Nigeria has no legislative power or the power to interpret non-interest banking to mean Islamic Banking only:

“CBN should sponsor a bill in the National Assembly if it must add anything to the extant (existing) laws. It cannot use a framework to change the law. It is not due process.”⁴⁹³

⁴⁹³ The Apostles in the Market Place (AiMP); a group of professionals formed to kick against I.B.F. in Nigeria.

Reacting to the above statement, Elbaff recounts that:

“From the spirit and substance of the various presentations all but the presentation made by Brett Johnson were vehemently opposed to the whole concept of Islamic Banking.”⁴⁹⁴

The other evidence of the Islamophobia tention, which obviously entails rejection of IBF by CAN, was the arrest of a private jet owned by CAN President, Pasto Orisejafo, loaded with ten million US Dollars, aimed at purchasing arms for CAN use in Nigeria. There were suspicions of an Israeli on board the jet conniving with CAN to supply arms to the falseflag Islamic *BOKO HARAM* insurgents to kill Muslims and destroy their businesses and structures in Northern Nigeria.⁴⁹⁵

From the foregoing, there is the need for the orientation of some Christian leaders to understand and appreciate the economic and inter-faith cooperation potentials of IBF taking example by the, earlier mentioned, 60% Christian shares in the Nigerian Islamic Jaiz Bank.

Accordingly, IBF stands as a force to be reckoned with in the pursuit of this unifying ambition. Yusuf⁴⁹⁶ stated that:

“The main challenge faced by the Islamic Development Bank, in its 40 years of operation since 1975, was to enlighten the public, both Muslims and non-Muslims on what IBF is all about.”⁴⁹⁷

⁴⁹⁴ Elbaff, J. A. 2011 Op. Cite.

⁴⁹⁵ <http://newsrescue.com/arms-smuggling-jet-caught-10million-south-africa-linked-can-president-ayoritsejafor/#axzz4JS52dLVO> Retrieved September 5, 2016

⁴⁹⁶ Yusuf, M.J., Public Relations Officer of Islamic Development Bank, Nigerian Branch.

⁴⁹⁷ An interview, broadcasted on Monday January 27, 2014 at 6.30 am Nigerian time, conducted by BBC Hausa correspondent, Abba Abdullahi, on the eve of 40 years anniversary of IDB in Senegal Dakar where the Bank’s African HQRS is based. 17 African countries including Nigeria are members both of the IDB and the IOC (Islamic Organization Countries). http://www.bbc.co.uk/hausa/audio_console.shtml?programme=shirinsafe Retrieved January 1, 2014.

Muslims and Christians have much in common in terms of faith. In that case they should be seen to be agreeing and cooperating and not otherwise. For the true Muslims, recognizing the laws in the Bible, as revealed to Prophet Isa (Jesus), is *sine quo non* to the Islamic faith. For true Christians and philosophers, the Prophet Muhammad is a Prophet of Allah and one of the, if not the most, greatest and influential men in human history. The Prophet Muhammad (PBUH) said:

“I am the closest of people to the son of Mary. The Prophets are brothers from different mothers, and there is no Prophet between him and me.”⁴⁹⁸

The Quran as the grand primary source of the Shari’ah, and consequently that of IBF laws, could be used as a tool for uniting the Muslims and Christians in Nigeria through demonstrating its legal provisions *vis-à-vis* the Bible as regards the *dos and don’ts* in the IBF system. A subsidiary source of the Shari’ah called ‘*Shara’i Man Qablana* (The revealed laws before Islam) symbolizes the legal nexus between the Islamic law (the Shari’ah) and the other faiths of the books (Ahlul Kitab), Christianity and Judaism.⁴⁹⁹

President Mandela of South Africa stated my mind in the following words:

“As we learn to hate, we should also learn to love one another irrespective of color and religion”.⁵⁰⁰

IBF, otherwise referred to as non interest banking and finance, has gained popularity across the globe from both Muslims and non-Muslims. In the words of Sanusi⁵⁰¹, I. B. is

⁴⁹⁸ Sahih Muslim, Book 30, Hadith 5834

⁴⁹⁹ Doi, A.I. 2007. Op. Cite, 85.

⁵⁰⁰ CNN Website: “Nelson Mandela 1918-2013” <http://edition.cnn.com/2013/12/05/africa/gallery/mandela-quotes/index.html?sr=fb120513mandelaquotes530p> Retrieved December 5, 2013 (on the eve of his demise on this day)

⁵⁰¹ Sanusi is currently the Emir (king) of Kano State and the immediate past Governor of the Central Bank of Nigeria and he had taken appreciable measures towards ensuring that I.B.F. smoothly operates in Nigeria. He was suspended from his CBN Governorship for exposing \$46 billion (later reduced to \$20 billion) which the President allegedly diverted from crude oil sales within a year. Fortunately for him the Governor of Kano

an alternative form of financial intermediation that is based on the Islamic value system, it is not the only form of profit and loss sharing bank based on non interest principles, but it is the most developed form that has international acceptance and recognition. Undoubtedly IB is based on a religious law; it is indeed not a religious product or service that is exclusively meant for a people of a particular creed. It is universally accessible to and enjoyed by people of diverse religious persuasions or ethical beliefs across the globe.⁵⁰²

Fortunately, despite the opposition by CAN, a significant number of Christians patronized and bought shares from the Jaiz bank. That is an indication that the Nigerian Christians have no problem accepting good things from people of other faiths. It is therefore important for CAN to begin to think positively and promote unity between Muslims and their Christian brothers.

4.2.2 Opposition to IBF by a Nigerian Court

The inability of many Nigerians to separate religion or politics from economy has led to heated debate on the desirability of IB. The ongoing controversy motivated this study to examine Non-interest banking system regardless of religious coloration and recommend the way it can serve as agent of economic transformation in a nation with 17% unemployment ratio and absolute poverty rate of about 70%.⁵⁰³

The opposition to the establishment of the Bank was climaxed by one Sunday Ogboji's application to an Abuja High Court seeking the nullification of its license on the grounds, *inter alia*, that it is unconstitutional as it is tantamount to declaration of a state religion. He

State, Engineer Rabiu Kwankwaso, appointed him as the Emir of Kano to succeed his late brother Emir Ado Bayero.

⁵⁰² Sanusi L.S., (2011). Op. Cite.

⁵⁰³ Alao, D.O and Esther M., (2012). Islamic Banking: The Controversy over Non-Interest Banking System in Nigeria. *Arabian Journal of Business and Management Review*, Vol. 1, No. 1, 65 74.

further argued that it discriminates against non-Muslims as only Muslims can be members of the Advisory Council.

On 15th June, 2012, Justice Gabriel Kolawale of Abuja Federal High Court declared, by *obiter dictum*, that the Bank license is ultravires null and void, although, fortunately, he did not withdraw the license. The court held that:

4.2.2.1 There are no provisions in the CBN Act and the Banks and other financial Institutions Act (BOFIA) that empowers the CBN Governor Sanusi Lamido Sanusi to issue license for non-interest financial institutions to operate under the principles of Islamic jurisprudence without the approval of the Head of State through the minister of finance.

4.2.2.2 That unlike the other specialized banks, the Jaiz International Bank PLC can only be established in the country with the intervention of the National Assembly by amending the BOFIA Act.

4.2.2.3 That the plaintiff has no *locus standi* to maintain the action, otherwise the court would have nullified the license issued to the Bank to operate non-interest banking under the principles of Islamic jurisprudence.

4.2.2.4 That the case is struck out for lack of *locus standi*, but the Attorney General of the Federation should take steps to remedy the situation, and further ensure that the CBN carries out its duties within the provisions of the law establishing it.⁵⁰⁴

The court was silent about the applicant's plea to declare the licensing of the bank 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.

⁵⁰⁴ *Sunday Ogboji vs. CBN and 2 others* (unreported) (2011). Op. Cite

Reacting to the decision of the court, Oba opined that the recent declaration of an Abuja (Federal Capital Territory) Federal High Court (FHC) that the operation of Islamic banking in Nigeria is unlawful and inconsistent with the provisions of the Central Bank of Nigeria (CBN) Act and Banks and other Financial Institutions Act has provoked heated reactions and concerns from various quarters in Nigeria. He added that, though the presiding Justice held that the Central Bank (CBN) has no power to designate Islamic bank as specialized bank and that the guidelines on Islamic banking license issued by the CBN had no statutory basis with which its legality could be substantiated, many hold reservations on this decision.⁵⁰⁵

The oppositions to IBF are more or less based on religious sentiments rather than principled constructive criticism based on concrete legal or moral grounds. It is therefore worthy to mention that though this decision has not been challenged but it does not speak well for the destiny of IBF in Nigeria. The refusal to challenge the decision is likely informed by the fact that since the pronouncement on the illegality is only an *obiter* and does not carry weight, challenging that decision may be opening the Pandora box hence it is better to allow the sleeping dog lie.

4.2.3 Arguments for IBF in Nigeria

Although CAN is opposed to the operations of IBF in Nigeria, several positive thinking Christians have expressed their support for the system. In fact some even went to the extent of expressing their criticism and dismay over the attitude of CAN and some Christians who oppose IBF. If countries like Britain, France and Australia can accept and promote the system, it will be ridiculous for a country like Nigeria, with Muslim majority, to be asked to abandon it. The fact that Muslims have the constitutional right to practice their religion

⁵⁰⁵ Oba, V.C. (2012). Islamic Banking in Nigeria: Issues and Trend, (2012), Social Science Research Network, available at <http://dx.doi.org/10.2139/ssrn.2166538> Retrieved December 8, 2013.

through avoiding the prohibited things in their business transactions, such as usury, the provision of Islamic alternative for them becomes cogent.

It is well observed that:

“Islamic banking is just a name as it is a non-faith, non-biased and not restricted to Muslims. About 60 per cent of the shareholders of Jaiz are Igbo from the South-East. Discrimination is strictly prohibited. It is open to Christians and everybody. Islamic banking is operating in 75 countries of the world including Britain, USA, South Africa, Kenya and Malaysia,”⁵⁰⁶

Similarly, the profit and job creation potentials make it an enormously promising venture and an undiscriminating societal benefactor; hence, the urge by this researcher for all to embrace it, irrespective of their religious background. This view was shared by Babayo Saidu⁵⁰⁷ in my proxy interview with him as he said:

“IBF is not only for Muslims. There is no any rule in the system which contradicts any Abrahamic religion. You will see categorical prohibition of usury in both the Old and the New Testaments. They did the same for alcoholism or anything that can injure humans. Therefore IBF is to serve humanity and bring distributive justice in the economy in the real, not just in the nominal, sense of it. I challenge anybody to bring any provision of the Bible or the Torah that contradicts IBF”

The following are evidence to buttress the true good image of IBF and its acceptance by some logically thinking non-Muslims. They sound objective, unbiased and seem to

⁵⁰⁶ Sanusi L.S. (2011). Op. Cite

⁵⁰⁷ Bababayo Saidu, Head of the Islamic Bank Window at the Stanbick IBCC Bank (21st August, 2013, Abuja, Nigeria)

comprehend the positive impact of the IBF system will have on any given society irrespective of the faith.

In my interview with Barrister Christian Chibueze Madu, he said:

“Muslims and Christians in Nigeria can be united through IBF since their religions are united in the prohibition of usury and other economic vices which is the foundation of the system. The fact that 60% of the shareholders of Jaiz Bank are my tribesmen, the Igbos, and Christians has proved my point. People do not come together and do business unless they love and trust one another. The Bible says: “where a man’s treasure is, there also is his soul”⁵⁰⁸

Similarly Mr Obayomi, a Nigerian, Christian, PhD student in the University of Malaya opined, in my interview with him, that:

“IBF can be a factor for inter-faith harmony because of its economic benefit which attracts a good number of Christians as well as the prohibition of usury by the Bible, the Qur’an and the Old Testament. The attraction is based on its economic benefit and not the religion of Islam. However, the fact that it could be a source of national unity and peace cannot be denied.”⁵⁰⁹

It was observed that:

“The establishment of an Islamic bank does not necessarily tally with the Islamisation of the Nigerian economy as critics may suppose, though such

⁵⁰⁸ Interview conducted on Friday, 12th June, 2015 at University of Malaya, Kuala Lumpur, Malaysia. Barrister Madu is a Nigerian on PhD (Law) program in the University of Malaya.

⁵⁰⁹ Interview conducted on May 5th, 2015 at the University of Malaya, Kuala Lumpur, Malaysia.

Islamisation may be desirable for the fulfillment of a basic tenets of Islam; the running by Muslims of their economic affairs in line with their religion”⁵¹⁰

A Bishop in the Dioceses of Chris Temple Ministry International, Bishop Goodluck Akpore, said opponents of Islamic Banking in Nigeria are ignorant of the products the bank offers as it is not against Christians in the country.⁵¹¹

These and other positive comments and attitude of the Christians in Nigeria are clear pointers to the fact that some Nigerian Christians do accept the IBF system Hence the possibility of using the system as a bridge builder as attested to in the previous interviews; Alhaj Bunu Monguno said:⁵¹²

“Nigeria is a free society! I learnt there are more Christian shareholders in the only Islamic Bank in Nigeria, the Jaiz Bank; so, IBF would serve as a peace, unity and prosperity broker in Nigeria.”

4.3 Prohibition of Riba (Usury) in the *Injila* (Bible) and Torah

Christians believe that the Bible is a combination of the Torah, revealed to Moses, and the Gospel revealed to Jesus.⁵¹³

The Bible, just as in the Qur’an, equally illegalizes usury. Since IBF aims to achieve the same objective with what the bible demands, it is a great surprise to hear Christians opposing it when its spirit is even promoting a position of the bible. The Bible states:

⁵¹⁰ Ahmad, M.I., and Izzat U. (1994). Islamic Banking Laws: Feasibility of Implementation in Nigeria. *International Comparative Law Report (ICLR)*, vol. 14, 116.

⁵¹¹ Economic Confidential Magazine, September 16, 2013 Bishop Urges Christians to Embrace Islamic Banking <http://economicconfidential.net/new/financial/monetary/1027-bishop-urges-christians-to-embrace-islamic-banking> Retrieved September 17, 2013.

⁵¹² Monguno, A. B. Op. Cit

⁵¹³ Adnan, M. Z. (2015). *The Quran and its Stud.* Centre of Qur’anic Research (CQR) Wisma R & D, University of Malaya, Kuala Lumpur, 38.

"If you lend money to My people, to the poor among you, you are not to act as a creditor to him; you shall not charge him interest".⁵¹⁴

Exactly as the Qur'an prohibits Riba and enjoins charity, the Bible has a parallel provision thus:

"One who is gracious to a poor man lends to the lord, And He will repay him for his good deed."⁵¹⁵

The ecclesiastical doctrine of interest was the greatest hindrance to modern banking. It was mainly based on two factors; Aristotle's criticism of interest as an unnatural breeding of money by money, and Christ's (supposed) denunciation of interest.⁵¹⁶

The moral disapproval of this ancient practice has been summarized in the following words:

"It comes as news to most people to learn that practically all important ethical teachers -- Moses, Aristotle, Jesus, Mohammed, and Saint Thomas Aquinas, for instance - have denounced lending at interest as usury and as morally wrong."⁵¹⁷

The Old Testament:

"classes the usurer with the shedder of blood, the defiler of his neighbor's wife, the oppressor of the poor, the spoiler by violence, the violator of the pledge, the idolater, and pronounces the woe upon them, that they who commit these iniquities shall surely die."⁵¹⁸

⁵¹⁴ New American Standard Bible Exodus 22:25

⁵¹⁵ New American Standard Bible Proverbs 19:17

⁵¹⁶ Luke 6:34

⁵¹⁷ Dennis, L. (1933). (Op. Cite).

⁵¹⁸ Old Testament 2

The usurer was categorized with extortionists, Sabbath-breakers, those who vex the fatherless and widows, dishonor parents and accept bribes.⁵¹⁹ He was also branded with the liar, the unrighteous, the backbiter, the slanderer and perjurer, and denied the right to inherit the New Jerusalem.⁵²⁰ The usurer is additionally categorized with the meanest and lowest of men and the vilest of criminals.⁵²¹

Before the Babylonian captivity, Ezekiel denounced the practice of usury as a great evil and mentioned the practice of oppressing strangers as part of the great wickedness.⁵²² Interest repayments on loans, even to resident strangers, were forbidden in the year of Jubilee⁵²³ whereas in regular years it was permissible to charge interest to strangers.⁵²⁴ Nehemiah, after the captivity, boldly denounced usury,⁵²⁵ instituted a reform and had retribution made for all usurious holdings:

"He that putteth not out his money to usury" Solomon gave us the proverb, "the borrower is servant to the lender."⁵²⁶

Jesus taught:

"Love ye your enemies, and do good and lend, hoping for nothing again."⁵²⁷

Usury was the basis for Jesus's calling the money changers thieves:

"The commerce of the world is conducted on principles as much at variance with the teachings of the master, as are the practices of a sneak thief or burglar. So the Master taught, as with whip of cords, he indignantly drove

⁵¹⁹ Ezekiel 22.

⁵²⁰ Psalm 15.

⁵²¹ Ezekiel 18.

⁵²² Ezekiel 9.

⁵²³ Leviticus 25:35-37.

⁵²⁴ Deuteronomy 23:19-20.

⁵²⁵ Nehemiah 5:9-11.

⁵²⁶ Nehemiah 15.

⁵²⁷ Luke 6:34-3.

its representatives, from the sacred precincts of the Temple, denouncing them as thieves. Every well-informed mind knows that the money changers in the Temple, on that startling occasion, were at the very center of the Jewish Banking system, and of the pitiless and grinding commerce of Palestine."⁵²⁸

In Jesus' parable on the subject of usury:

"only the hard, austere man, one whose conscience will not interfere with his reaping where he has not sown, and taking up where he has not laid down, would extract usury, for he makes the lord of the parable tell the servant of it: You say I am a hard and austere man, then why did you not act accordingly, and earn me my usury as my nature demanded?"⁵²⁹.

The Apostle Peter publicly told his vision:

"And in another lake, full of pitch and blood and more bubbling up, there stood men and women on their knees: and these were usurers and those who had taken interest. . ."⁵³⁰

4.3 IBF as Religious Obligation and Therefore a Constitutional Right

Religious obligations are the compliance with the dos and don'ts of a particular religion by its followers. The question arises; what does Islam oblige the Muslims to avoid or practice in running their banking and financial transactions? The two core disparities between the conventional and the Islamic Banking systems are that while the former permits *riba* and trade in alcohol, swine and gambling, the latter prohibits same.⁵³¹ Islamic

⁵²⁸ Luke 19.

⁵²⁹ Matthew 25:26-27; Luke 19:22-23.

⁵³⁰ Antinocene Fathers, Vol. IX, p. 146.

⁵³¹ Swine is regarded by the Quran and Bible as the most unclean and the most abhorred of all animals in the Quran Ma'ida 5:90; Bible Lev. 11:7; Isa. 65:4; 66:3, 17; Luke 15:15, 16, 8:32, 33 Matt. 7:6; Prov. 11:22.

law by definition and concept is the natural order established by Allah for mankind to achieve balance, justice and equity not only for men but also for all things created by Allah material and non-material. It is a whole system that does not give room for selective appreciation of nature.⁵³² The Qur'an states

“We have made for you a law (Shari ‘a) so follow it and not the fancies of those who have no knowledge” (Qur’an 45:18)

“Nor did the people of the Book make schisms, until after there came to them Clear Evidence.”(Qur’an 96:4)

When a man confessed to the Prophet [S.A.W.] that he used to cheat in his business transactions, the Prophet then directed that there should be no treachery or cheating in business transactions.⁵³³

The Bible further illegalizes usury as it enshrines:

"If you lend money to My people, to the poor among you, you are not to act as a creditor to him; you shall not charge him interest.⁵³⁴

Exactly as the Qur'an prohibits riba and enjoins charity, the Bible has a parallel provision:

“One who is gracious to a poor man lends to the lord, And He will repay him for his good deed.”⁵³⁵

From the foregoing, I.B.F. forms part of worship in the Islamic religion and therefore, logically and legally, becomes the Muslim’s constitutional right to worship guaranteed by section 38 of the 1999 Nigerian constitution. In fact it is also the right of the Christians and

⁵³² Imam I., et al, (2010). Op. cit., 116.

⁵³³ Muwatta Hadith 1393.

⁵³⁴ New American Standard Bible Exodus 22:25.

⁵³⁵ New American Standard Bible Proverbs 19:17

Jews, if they could decide wisely to claim so, because the foregoing reveals that their religions have parallel prohibitions on the subject.

However, not all conventional Bank transactions are repellent to the Shari'ah. As was done to the customary laws of the pre-Islamic Jahiliyya on the advent of Islam, the same adaptation and emendation principle applies to the conventional banking and financial practices and products. The various forms of transactions undertaken by conventional banks fall under one or the other types of economic transactions broadly classified under the Islamic law.⁵³⁶

4.4 The Qur'an and Hadith Harmonising the Muslims, Jews and the Christians

4.4.1 Explaining the Qur'an

The Qur'an is the book of Allah revealed to the last messenger of Allah Muhammad (PBUH) which serves as guidance and a criterion. The Qur'an was revealed in piece meal within a period of 23 years to the Prophet (PBUH):

“And [it is] a Qur'an which We have separated [by intervals] that you might recite it to the people over a prolonged period. And We have sent it down progressively.”⁵³⁷

Allah expatiates why the Quran was revealed piecemeal:

“And those who disbelieve say, why was the Qur'an not revealed to him all at once?" Thus [it is] that We may strengthen thereby your heart. And We have spaced it distinctly” (Qur'an 25:32).

⁵³⁶ Abikan, A.I. (2009). Op. Cite. 96

⁵³⁷ Qur'an, Isra, 17:106.

The piecemeal revelation of the Qur'an has greatly helped in making the understanding and memorization of the Qur'an very easy.⁵³⁸ Whenever an issue crops up, Allah reveals verses to address it. For example when a companion did *Zihar*⁵³⁹ divorce to his wife⁵⁴⁰ the woman came to the Prophet (PBUH) and complained, the prophet (PBUH) kept quiet until Allah revealed some verse to state the position of the Shari'ah thus:

“Certainly has Allah heard the speech of the one who argues [i.e., pleads] with you, [O Muhammad], concerning her husband and directs her complaint to Allah. And Allah hears your dialogue; indeed, Allah is Hearing and Seeing. Those who pronounce zihar among you [to separate] from their wives – they are not [consequently] their mothers. Their mothers are none but those who gave birth to them. And indeed, they are saying an objectionable statement and a falsehood. But indeed, Allah is Pardoning and Forgiving.” (Qur'an, Mujadalah, 58:1-2).

The Qur'an is full of miracles which point to the fact that it was indeed a revelation from the lord of the universe. The Qur'an challenged the whole of mankind and jinn to produce something like the Qur'an but up to this time no person was able to do so. The Qur'an states:

“And it was not [possible] for this Qur'an to be produced by other than Allah, but [it is] a confirmation of what was before it and a detailed explanation of the [former] Scripture, about which there is no doubt, from the Lord of the worlds.” (Qur'an, Yunus, 10:37).

⁵³⁸ Ibn Kathir, I. (1999). Op. Cit., 200.

⁵³⁹ the prohibited oath of abstinence by a husband from his wife, comparing her with his own mother

⁵⁴⁰ Zihar is a form of divorce which occurs when a person declares that his wife is like his mother or any woman within the prohibited degrees of marriage. Doi, A.I., Op. Cit. 122.

The Qur'an challenges those who doubt its authenticity:

“Or do they say; He invented it”? Say, "Then bring ten surahs like it that have been invented and call upon [for assistance] whomever you can besides Allah, if you should be truthful."(Qur'an, HUD 11:13).

Several Prophecies were mentioned by the Qur'an which became a reality. For instance when the Romans were defeated by the Persians, the idolaters were happy because the Persians were equally idolaters just like the Arabs while the Romans were Christians which is an Abrahamic religion just like Islam. They said that the defeat of the Romans is a sign that they will equally defeat Islam. Allah revealed the verses in Surah al-Rum which stated that though the Romans have been defeated, they will soon fight back and defeat the Persians (Qur'an, Rum, 30:1-6). This and several other prophecies of the Qur'an happened.

The Qur'an contains several scientific realities which could not be discovered until recently. For instances, Allah gave a perfect description of the creation of man. The Qur'an states

“And certainly did We create man from an extract of clay. Then We placed him as a sperm-drop in a firm lodging [i.e., the womb]. Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation. So blessed is Allah, the best of creators.” (Qur'an, Muminun, 23:12-14).

It is totally impossible to make a discovery during the time of the Prophet (PBUH) because of the sophistication and scientific facts involved.

4.4.2 Qur'an on Inter-Faith Harmony

Indeed with this wonderful position of the Qur'an, one cannot help but agree to the fact that the Qur'an was revealed to serve as guidance and mercy to the whole humanity. It should be a unifying force between the whole of mankind hence a very good instrument of bringing understanding between the Muslims and Christians in Nigeria. Several verse of the Qur'an point to the fact that the Qur'an intends to unite us and not to divide us. For instance the Qur'an explains:

"Surely those who believe, and those who are Jews, and the Christians, and the Sabians -- whoever believes in God and the Last Day and does good, they shall have their reward from their Lord. And there will be no fear for them, nor shall they grieve"(Qur'an, al-Baqarah 2:62, al-Maidah 5:69).

The Qur'an expatiates further:

"If only they [i.e. Christians] had stood fast by the Law, the Gospel, and all the revelation that was sent to them from their Lord, they would have enjoyed happiness from every side. There is from among them a party on the right course, but many of them follow a course that is evil"(Qur'an, al-Maidah 5:66).

In yet another verse Allah admonishes Christians:

"Oh People of the Book! Commit no excesses in your religion, nor say of God anything but the truth. Christ Jesus, the son of Mary, was (no more than) a messenger of God, and His Word which He bestowed on Mary, and a spirit proceeding from Him. So believe in God and His messengers. Say not, 'Trinity.' Desist! It will be better for you, for God is One God, Glory be to Him! (Far exalted is He) above having a son. To Him belong all things in

the heavens and on earth. And enough is God as a Disposer of affairs" (Qur'an, al-Nisa, 4:171).

Allah reiterated His call for all humans to unit in Islam by revealing that we are all one and should therefore live in harmony:

"Mankind was but one nation, but differed (later). Had it not been for a word that went forth before from thy Lord, their differences would have been settled between them." (Qur'an, Yusuf 12:19).

To the Nigerian Christians, the Qur'an has even pointed to the fact that, of all the believers in other religions, the Christians are the most loving and kind to the Muslims.

Allah describes:

"...and nearest among them in love to the believers will you find those who say, 'We are Christians,' because amongst these are men devoted to learning and men who have renounced the world, and they are not arrogant." (Qur'an, al-Maidah 5:82).

A historic fact that buttresses this Qur'anic fact is the migration of the companions of the Prophet (PBUH) to Ethiopia for protection when the persecution of the *Quraysh* became unbearable. The Prophet told them to go to *Najashi*, a Christian king that is just and will provide them protection. When the companions went to the Christian King, he accepted them and protected them. The *Quraysh* sent delegation with gifts to the King so that he can give them back the Muslims. Upon arrival they told the king that the Muslims are their relatives who stayed away from the path of their forefathers and they even insult Jesus Christ. Then the king asked the Muslims to reply to these allegations. Jafar, a cousin of the Prophet (PBUH), was the leader of the delegation and he replied that, before Islam, they were leaving in darkness and Allah brought them light (Islam). The strong oppressed the weak; they killed their daughters and do all kinds of vices. Allah saved them from all of

these vices. With respect to the allegation on Jesus, Jafar recited the verses of Surah al-Maryam thus:

“And mention, [O Muhammad], in the Book [the story of] Mary, when she withdrew from her family to a place toward the east. And she took, in seclusion from them, a screen. Then We sent to her Our Angel [i.e., Gabriel], and he represented himself to her as a well-proportioned man. She said, "Indeed, I seek refuge in the Most Merciful from you, [so leave me], if you should be fearing of Allah." He said, "I am only the messenger of your Lord to give you [news of] a pure boy [i.e., son]." She said, "How can I have a boy while no man has touched me and I have not been unchaste?" He said, "Thus [it will be]; your Lord says, 'It is easy for Me, and We will make him a sign to the people and a mercy from Us. And it is a matter [already] decreed.'" So she conceived him, and she withdrew with him to a remote place. And the pains of childbirth drove her to the trunk of a palm tree. She said, "Oh, I wish I had died before this and was in oblivion, forgotten." But He called her from below her, "Do not grieve; your Lord has provided beneath you a stream." (Qur'an, Maryam, 19:16-14).

When Ja'afar completed his recitation, Najashi the King was in tears, he said that my religion (Christianity) and yours (Islam) is only separated by a very thin line. He then turned to the Quraish and said he will not hand over the Muslims to them. And the Muslims have the right to stay in his land up to the time they want.⁵⁴¹

⁵⁴¹ Safieddine, S. (2011). *Migration to Abyssinia*. Message of Thaqalayn, Vol. 12, No. 2, 92.

Allah elaborates that the nearest among the other people of the book who love Muslims are those who say, "We are Christians": because amongst these are men devoted to learning and men who have renounced the world, and they are not arrogant. (Al Maida - Verse 82).

The discussion has clearly shown that the Qur'an is a very strong unifying factor between the Muslims and peoples of all faiths especially our Christian brothers in Nigeria. The respect for the right of Muslims such as the right to operate IBF will go a long way in fostering unity and understanding between us.

4.5 Peace as a Product of Economic Buoyancy

Poverty is a problem that affects millions of people across the globe. Islam, as a complete way of life, has left no part of the human life unattended. With respect to poverty, the Qur'an, and indeed, traditions of the Prophet (PBUH) have guided Muslims on ways to avoid poverty by engaging in lawful forms of businesses such as IBF. Poverty is a great trial and a difficult situation. The Prophet sought for Allah's protection against poverty because it breeds and entails crime and sin. The prophet (PBUH) said

"O Allah, I seek refuge in Thee from poverty, lack and abasement, and I seek refuge in Thee lest I cause or suffer wrong."⁵⁴²

The Qur'anic injunctions allow trade, sale and creation of debt which in implicit terms recognize legitimate profit as in IBF. Forty out of the 6,666 verses of the Quran provide for this subject. Apart from one important verse on performing contract which enjoins believers to keep faith to contracts,⁵⁴³(Quran: Surah al-Maidah 5:1) three verses with a common theme of keeping promise⁵⁴⁴(Quran: al-Isra verse 34) and there are verses which provide for

⁵⁴² Sunan Abu Dawud Hadith 1539.

⁵⁴³ Quran: al-Maidah 5:1.

⁵⁴⁴ Quran: al-Isra verse 34.

advanced commercial contracts like hire, charges and fiduciary transactions such as deposit. The Qur'an approves legitimate trade as follows:

“Those who devour usury will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury.”(Qur'an, al-Baqara 2:275).

This is in fact encouraged by the obligation to pay religious alms or zakat which indirectly necessitates the accumulation of wealth. Additionally and more importantly, the hadith of the Prophet Muhammad, may peace be upon him, buttresses the view that poverty leads to disbelief (which, in turn, breeds crime):

“Poverty can lead to kufr (disbelieve)”⁵⁴⁵

I.B.F. can be used as a machinery to enhance the economic buoyancy of nations and individuals. It could enormously check crime rates and partake in the national struggle to appease the religious insurgents in Nigeria who are mostly poor and unemployed.

If there is no peace, poverty will be an inevitable product. This is because unrest causes destruction or lives and properties. It prevents business transactions, cuts relationships and destroys all positive opportunities. An indisputable fact is that, where there is poverty, it creates a perfect breeding ground for unrest. The Boko Haram terrorism bedeviling Nigerians today partly rooted from poverty. According to Nasir:

“70% of the crises are caused by hunger. If the Nigerian government could loan (interest free) half of the One Trillion Naira he spends annually on curbing religion based insecurity, there could have been no religious insurgency in Nigeria”⁵⁴⁶

⁵⁴⁵ Bukhari, vol. 7, Hadith 840.

⁵⁴⁶ BBC Hausa Radio interview program of Monday, 4th November, 2013 6:30 am Nigerian time. Available at http://www.bbc.co.uk/hausa/audio_console.shtml?programme=shirinsafe Retrieved November 4, 2013.

As IBF is proven as a machinery of eradicating poverty, it could therefore be deemed a fundamental human right:

“Massive poverty and obscene inequality are such terrible scourges of our times — times in which the world boasts breathtaking advances in science, technology, industry and wealth accumulation — that they have to rank alongside slavery and apartheid as social evils... Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life... While poverty persists, there is no true freedom.”⁵⁴⁷

Accordingly, IBF, as it enhances the economic buoyancy of nations and individuals, could enormously check crime rates and partake in the national struggle to appease the religious insurgents in Nigeria who are mostly poor and unemployed as visible from most members of the Boko Haram who were arrested.

Gombe State Governor in Nigeria made the members of the *En Kalare*⁵⁴⁸ in his state lay down their arms by offering them employments and skill acquisition training opportunities. They pledged to stop violence as they are now gainfully employed. Some advocate for interest free loans as business capitals.⁵⁴⁹

Acceptance of IBF in Nigeria will enormously impact on the economic enhancement of the populations of all religions especially the youth who are angry with the state because they are left hungry. A hungry man is an angry man.

⁵⁴⁸ These are unemployed youth who could be hired to serve as political thugs and for attacking enemies by individuals.

⁵⁴⁹VOA Hausa Interview with former *En Kalare* in Gombe, Nigeria (<http://www.voanews.com/mp3/voa/africa/haus/haus0500a.mp3> (visited 18/11/2013))

4.6 Acceptance of IBF in Non-Muslim Nations: A Ground for its Constitutionality in Nigeria

The West has no permanent enemies or friends but interests and hence their acceptance of IBF for its economic benefits. Several western nations have started it due to the positive attributes and financial gains associated with it. Below are examples of such non-Islamic nations:

In Switzerland, the Swiss authorities granted a banking licence to Faisal Private Bank to operate IB. The Geneva based bank will be the first in Switzerland to operate according to Islamic law (Shari'ah) principles. The latter prohibit usury, trading in financial risk, women opening bank accounts without their husband's approval, etc. Shari'ah products also cannot be invested in companies involved in gambling, alcohol, tobacco, pornography and the production of pork.⁵⁵⁰ The Swiss authorities appreciate the fact that beside the economic gain associated with IBF, the prohibitions of alcohol, tobacco and pornography could as well be a factor for the acceptance of the system as the negative effects of the said items are enormously bedeviling the West.

In Europe, as epitomized by France due to its colonial relations with North African Arab Muslims, the Shari'ah situation is dichotomized into two; the *Salafis* working towards codification while others seek to see an uncodified Shari'ah impacting based on religious ethics.⁵⁵¹

French Finance Minister Christine Lagarde has announced France's intention to make Paris "the capital of Islamic finance" and announced that several Islamic banks would open

⁵⁵⁰ Belien, P., (2006). First Sharia Bank in Switzerland The Brussels Journal <http://www.brusselsjournal.com/node/1479> Retrieved September 11, 2015.

⁵⁵¹ Manni Crone. (2011). *Sharia and Secularism in France*. Islam and Christian-Muslim Relations, Volume 22, Issue 4, 156.

branches in the French capital in 2009.”⁵⁵²This move was later hijacked by Britain and went to the extent of hosting the Annual Global IBF Conference this year, 2014.

In England, HSBC, Lloyds TSB, and Citigroup have opened IB units and branches throughout England. In 2005 the first stand-alone British Islamic bank, Islamic Bank of Britain, opened its doors. Middle Eastern Islamic banks have also set up branches in the UK.⁵⁵³ This positive move by the UK has significantly added weight to the fact the England is fast becoming an international centre of Islamic banking and finance.

The history of the abhorrence of usury in England featured clearly by William Shakespeare in his book the Merchant of Venice:

“Antonio also forgoes his half of Shylock’s wealth on two conditions: first, Shylock must convert to Christianity, and second, he must will the entirety of his estate to Lorenzo and Jessica upon his death. Shylock agrees and takes his leave. The joyful news arrives that Antonio’s ships have in fact made it back safely. The group celebrates its good fortune.”⁵⁵⁴

Shakespeare’s story showed that both Judaism and Christianity prohibited usury which was why Shylock, the usurer, was asked to accept Christianity.

In the Netherlands, A quote from Wouter Bos, the Dutch Finance Minister (and leader of the Dutch Labour Party), 16 July 2007 reads,

“We want to encourage Islamic banking; in the first place because Islamic banking meets a demand from the Muslims living in the Netherlands. In the second place because we see an opportunity here for the Dutch financial

⁵⁵² Tiberge Vatican Paper Supports Islamic Finance. France Wants Its Share of Sharia Banking The Brussels Journal, 2009 <http://www.brusselsjournal.com/node/3819> (visited 17/9/2013)

⁵⁵³ Christofi, H. (2009). Islamic Banking in Britain. *The Brussels Journal*, vol 2, 12.

⁵⁵⁴ Shakespeare, W. (1997). *The Merchant of Venice*. Dover Thrift Editions Paperback – Unabridged, June 22, 1995

sector; a third reason is that banning Islamic banking from the perspective of fighting terrorism will have a counter-productive effect. Denial of an actual need can lead to money-flows running via alternative channels out of the sight of the government.”⁵⁵⁵

Those three rational for Netherlands’ acceptance of the system are logical and will serve as a campaign for the system in the rest of the world where it is not yet accepted. This buttresses an objective of this thesis on the use of IBF as a tool for national harmony.

4.7 Evidence of the existence of IBF and their Legal Challenges in Asia

IBF is well accepted in Asia than any other part of the globe. This may not be unconnected with the fact that Islam is stronger in this part of the world as in Nigeria despite the existence of the adherants of other religions. The world centers of the system are all in Asia with Malaysia taking the lead as a global hub.⁵⁵⁶ This discussion on IBF in Asia is aimed at improving the Nigerian IBF system, being a tool for national harmony. It also shows that these multi religious nations operated the system without much opposition from non-Muslims unlike Nigeria as shown above. This sub-head is intended to prove the existence of the system in Muslim majority jurisdictions without violating Christian rights.

4.7.1 Malaysia

Malaysia is one country in Asia that has the fastest growing economy and is rated as a very important rallying point for IBF in the world.⁵⁵⁷ It can best be described as the heart of the global success of IB.⁵⁵⁸ that may not be detachable from the fact that Malaysia is

⁵⁵⁵ Bos, W. (2007). The Netherlands Want to Become Centre of Sharia Banking, *The Brussels Journal*, vol. 7:17, 42.

⁵⁵⁶ Abdul-Hamid, M. (2013). *Malaysia as a Hub for Islamic Finance: on Choice of Law and Forum for Settlement of Disputes*. Islamic transactions and finance: principles and Developments, Part 2:99-114

⁵⁵⁷ Markom, R. and Imsail N. (2009). Development of Islamic Banking Laws In Malaysia: An Overview. *JurnalUndang-Undang*, vol., 2, 201.

⁵⁵⁸ See Appendix C for the list of Islamic Banks in Malaysia.

rated as one of the fastest Muslim developing states in the world. This positive stance of the Malaysian state has significantly helped in bringing smile into the faces of people clamouring for the operation of the system. Many aspects of Malaysian laws on contract and commerce are actually similar to those of the Shari'ah.⁵⁵⁹

Historically, IBF in Malaysia started as a small scale form of financial transaction that is in line with Islamic rules: that was in 1962 with the establishment of the 'Pilgrim's Management Fund (Tabung Haji).⁵⁶⁰ It continued to cope and offer services for over 10 years.⁵⁶¹ Though it did not start as full pledge banking, it tried to offer services to people in an Islam friendly way. The first full pledge bank that carries on the needed Islamic identity both in name and action was Bank Islam. The Islamic Banking Act (IBA) of 1983 saw the coming of Bank Islam in 1983 which operated as a full pledge Islamic bank. Bank Islam equally enjoyed monopoly for 10 years as the only Islamic Bank that operates in Malaysia.⁵⁶²

The formal steps towards its operation in Malaysia started with the enactment of the Islamic Banking Act, 1983. The current law governing IBF in Malaysia is the Islamic Financial Services Act (IFSA) 2013.

⁵⁵⁹ Buang, A. H. (1996) *The Prohibition of Gharar in the Islamic Law of Contracts: A Conceptual Analysis with Special Reference to the Practice of Islamic Commercial Contracts in Malaysia*, *PhD thesis, (School of Oriental and African Studies, 1996) 363-416.*

⁵⁶⁰ Rosly, S. A., & Bakar, M. A. A. (2003). Performance of Islamic and Mainstream Banks in Malaysi. *International Journal of Social Economics*, vol. 30(12), 1249-1265; Dusuki, A. W., & Abdullah, N. I., (2007) *Op. Cite.* 142-160.

⁵⁶¹ Mokhtar, MSA. et al (2006). Efficiency of Islamic Banking in Malaysia: A Stochastic Frontier Approach. *Journal of Economic Cooperation*, vol. 27, no. 2, 37.

⁵⁶² *Ibid.*

The Court of Appeal in Malaysia in March 2009 reversed the decision of the Kuala Lumpur High Court which declared *Bai Bithaman Ajil* (“BBA”) contracts as contrary to the Shari’ah and therefore not allowed in IBF transactions.⁵⁶³

The challenge of increasing the participatory status of IBF in countries with dual banking and financial streams such as Malaysia to a parallel level is not likely to be met soon. This is because the stronger conventional banks and financial establishments still control the industry and it has been an unequal playing field for IBF ever since its emergence in the early 1980s in Malaysia.⁵⁶⁴

As this research is aimed towards achieving the Malaysian situation in Nigeria, for the peace, unity and prosperity of Nigerians, it is cogent to identify and proffer panacea to the lacunae in the basic law of the land, the constitution, regarding the subject.

4.7.2 Bangladesh

In Bangladesh, IB started with the efforts of small group of people; the Islamic Bankers Associations.⁵⁶⁵ Thereafter, with their effort in 1983, the Islamic Bank Bangladesh Ltd. was established with aimed at making the Bangladeshi economy Riba free. In establishing the first ever Islamic bank in South Asia, Bangladesh government, with 5% paid up capital, joined the Islamic Bankers Association with some other prominent banks from Saudi Arabia (Al-Rajhi Company for Currency Exchange and Commerce), Kuwait (Kuwait Finance House), Jordan (Jordan Islamic Bank), Qatar (Islamic Investment and Exchange Corporation), Bahrain (Bahrain Islamic Bank), Dubai (Dubai Islamic Bank), Islamic Development Bank and Ministry of Awqaf and the Islamic Affairs of Kuwait. Even though

⁵⁶³ *Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) and Other Cases* [2009] 1 CLJ 419.

⁵⁶⁴ Kamali, M.H., (2009). *Islamic Banking and Finance*. Quoted from *IAIS Malaysia: Exploring The Intellectual Horizons of Civilizational Islam*, 2nd edition Malaysia, 3.

⁵⁶⁵ Sarker, M. A. A. (1999). *Islamic banking in Bangladesh: performance, problems, and prospects. International Journal of Islamic Financial Services*, 1(3), 15-36.

the system was started more than thirty years ago, there is no specific law on Islamic banking. The country first included provisions relating to Islamic banking in its Income Tax Ordinance 1984 to include profits paid on Mudaraba as expenditure. In the 1990s, instead of enacting any specific statutory law, the central bank of the country, Bangladesh Bank, established a Research and Islamic Economic Division, which handled different matters relating to Islamic banking in the country.

In 2004, the Bangladesh Bank issued first ever Shari'ah Complaint Bond i.e. Government Islamic Investment Bond and in 2007, IBBL issued Mudaraba Perpetual Bond (MPB). There are six exclusively Islamic banks and twenty two out of forty seven conventional commercial banks have opened Islamic banking section.⁵⁶⁶

In November 2009, the Bangladesh Bank issued Guidelines for Conducting Islamic Banks. According to these Guidelines, "Islamic bank" means such a banking company or an Islamic banking branch (es) of a banking company licensed by Bangladesh Bank, which follows the Islamic Shari'ah in all its principles and modes of operations and avoids receiving and paying of interest at all levels. All the Islamic Banks are required to follow the provisions of the Banking Companies Act 1991, the Companies Act 1994 and the Prudential Regulation of Bangladesh Bank.⁵⁶⁷ The 2009 Guidelines contain provisions relating to criteria for setting up full-fledged Islamic banks, terms and conditions for opening Islamic banking branches by conventional commercial banks, conversion of conventional commercial banks into Islamic banks, responsibility for Shari'ah compliance, principles of deposit, investment principles and investment products, maintenance of Cash Reserve Ration (Statutory Liquidity Ration), liquidity management, preparation of financial statements and framework of rate of return. However, from the point of view of

⁵⁶⁶ Ahmad, A. U. F., & Hassan, M. K. (2007). Regulation and performance of Islamic banking in Bangladesh. *Thunderbird International Business Review*, 49(2), 251-277.

⁵⁶⁷ Bangladesh Islamic Banks Guidelines 2009

interpretation of statute, the Guidelines provide that ‘guideline should be treated as supplementary, not a substitute, to the existing banking laws, rules and regulations. In case of any point not covered under this Guideline as also in case of any contradiction, the instructions issued under the Banking Companies Act and Companies Act will prevail.’ There is a separate law for the financial institutes like Islamic Finance and Investment Limited, i.e. the Financial Institutions Act, 1993. Islamic banks that are engaged in capital market activities simultaneously perform their activities under the supervision of the Securities and Exchange Commission and have to comply with the provisions of the Securities and Exchange Commission Act 1993. Hence, Islamic banking business has to comply with different legal provisions available in different laws.

From the foregoing, one of the main challenges in the development of IBF in Bangladesh is that there is no separate law to govern Islamic banking in the country. Besides, there is no specialized court also to handle IBF litigations unlike women and children, environment, etc. matters. There is no Central Shari’ah Board or Council or Policy in the country to oversee Islamic banking operations. Furthermore, there is no sufficient and significant projection of efforts to increase properly trained human resource in this area.

Owing to the expertise of Bangladesh on IBF, Jaiz Bank Plc appointed Muhammad Nurul Islam from the Islamic Bank of Bangladesh Limited as its Managing Director/CEO in 2013.⁵⁶⁸

4.7.3 Maldives

Maldives, an island nation in the Indian Ocean, is a Muslim country and former British Colony. The legal system is an admixture of Islamic law and English Common law.⁵⁶⁹ The

⁵⁶⁸ Jaiz Bank Official Website (2013) <http://jaizbankplc.com/index.php/component/search/?searchword=Muhammad%20Nurul%20Islam&ordering=newest&searchphrase=all&limit=20>

⁵⁶⁹ Ibrahim, M. and Karim, E. (2013). Research Guide on Legal System and Research of Maldives.

latter covers Civil and Commercial laws while the former covers mainly Family, Evidence and Criminal laws. It is a republic based on presidential democracy with separation of power between the three organs of government; the Executive, the Judiciary and the People's Majilis (the Parliament).⁵⁷⁰ The main economic activity is centered on the Tourism related businesses. The GDP USD 6300/- per capita -a population of 320,000 in which life expectancy is 77 years and literacy rate is 98.4%.⁵⁷¹

With the opening of the first Islamic bank, the Maldives Islamic Bank (MIB), on 14th March 2011, it practices dual Islamic and Conventional banking systems. There are two full-fledged Islamic Financial Institutions, the MIB and Amana Takaful (Maldives), and four other institutions which provide Islamic Finance Windows – the Bank of Maldives (BML), the Housing Development Corporation (HDFC), the Capital Market Development Authority (CMDA) and Alia Ijara altogether six institutions where the Islamic finance services are rendered.⁵⁷²

The regulatory regimes are as primarily contained in the Maldives Monetary Act (MMA) 1981 and Maldives Banking Act (MBA) 2010. They lay down the regularity, supervisory and business practices of banks in the country. The basic Islamic financial regulation is made under section 65 of the MB Act, which came into force on 6th March 2011, is also referred to as the “Islamic Banking Regulation”. The regulation contained 27 sections in principles which cover the procedure of licensing and supervision of the Islamic banking industry. Section 27 of the Regulation defines Islamic Banking as follows: “any Company, licensed under Law No. 24/2010, (Maldives Banking Act) and Law No. 6/81 (Maldives

<http://www.nyulawglobal.org/globalex/Maldives.htm> Retrieved February 21/2014.

⁵⁷⁰ Alkali, M. B. et al (2014). *Islamic Banking And Finance In Africa And Asia: A Comparative Legal Study. University of Malaya, First International Conference of Africa-Asia Development Network*, 6.

⁵⁷¹ Ibid. 6.

⁵⁷² Ibid. 6.

Monetary Authority Act 1981) to engage in banking business carrying out all of its banking business according to the precepts and principles of Islamic Shari'ah".

Section 11 of the MBA listed the following ten items as permissible in the country: The listed items are total 10: mobilization of funds by way of deposit and saving accounts, investment products, finance leasing of movable and improvable assets on the basis of *Ijrah*, benevolent loans, debit and Credit cards, safe keeping, money transfer, functions of trustee based *Wakala*, credit facilities and other facilities and product as may be approved by the authority. These facilities are listed as Islamic finance facilities. However, other Islamic contracts and products that may be approved by the Shari'ah are also allowed.

In terms of the challenges, the Maldives faces and shares almost all the common problems prevalent in the Islamic financial industry in the world. That is lack of the comprehensive legal framework, expertise in the field and public awareness. In addition to this, the scope of Islamic investment is very limited as tourism is the major economic activity which Islamic bank is reluctant to invest in because of non-conformity with the Shari'ah such as serving alcohol and pork. There is the need for a specialized research to solve this legal problem.

4.7.4 Iran

After the 1979 revolution the government of Iran played a primary role in converting conventional banking into IB. In 1983, the law of usury-free banking was passed, and in 1984, interest free banks started to implement it based on the 1983 law. Most of the banks (28 out of 36) were merged and nationalized. As a result of this, the number of banks was reduced to 6 commercial and 3 specialized banks, a total of 9 banks. In contrast to most

countries that have some degree of IB, Iran had completely transformed its banking activities to comply with the accepted Islamic principles in the country.⁵⁷³

The system in Iran is run by the government initiatives in the early 1980s when it initiated some administrative actions to eliminate interest from all kinds of banking operation with a scope of maximum service charge of 4 per cent. The government enacted the Usury-free Banking Law in March 1983 and the whole country has turned to be an interest-free.

After the 1979 Islamic Revolution, all banks have to follow Shari'ah banking procedures, including the forbidding of interest (*Riba*). The Supreme Audit Court of Iran regulates banking and financial operations. In recent years, Iran, like some other Muslim countries, has created free trade zones, such as those on *Kish* Island and the port of *Chabahar* where such rules are not applied. This was to stimulate global investments.⁵⁷⁴

From the above discussion one can reach to the following findings-

First, Islamic banking system in Malaysia, Maldives and Iran has been patronized by the government, whereas it is developed as private movement in Bangladesh.

Second, the citizens of all these countries are predominately Muslims although Malaysia, being at the bottom in the list in terms of percentage of Muslim population, has been leading the movement.

Third, of all the countries discussed in this chapter, Bangladesh first started the Islamic banking journey, but the country could not achieve the institutional shape and the success of the country in this area is yet to reach to a satisfactory level. There is no special law to

⁵⁷³ Hassani, M., (2010). Islamic Banking and Monetary Policy: Experience of Iran. *International Review of Business Research Papers*, Volume 6. Number 4, 435.

⁵⁷⁴ Ibid..

deal with the matter in the country and also there is no special judicial body to decide disputes on Islamic banking matters.

Fourth, Malaysia is well advanced in terms of progress and development in this area. This is because there is specific IB law which is as old as the history of Islamic banking in the country. The policy makers of the country assigned dedicated judges to deal with Islamic banking matters even though they are not Shari'ah judges. This is due to constitutional lacunae relating to adjudications on IBF. Besides, there is Law Review Committee within the Bank Negara, the Central Bank of the country. Furthermore, the Kuala Lumpur Regional Center for Arbitration (KLRCA) is there to handle disputes on pertaining to IBF.

Fifth, Maldives has been experiencing a slow development and progress in IB because of its limited scope of investment due to its geographical location as well as its main source of income, tourism, which is termed un-Islamic thus, illegal in IBF transactions.

Sixth, in most of the countries covered in this chapter, there is a lack of human resource to run the IBF business.

4.8 Legal Challenges Facing IBF in Nigeria

The argument on the constitutionality of IBF in Nigeria is a problem that has generated hot debate, the Constitution of the Federal Republic of Nigeria has been the basis for such debate as climaxed by the Abuja Federal High Court decision in *Sunday vs. CBN and Two Others* which, as discussed earlier, declared illegal the License of the Jaiz Bank PLC, the only fully pledged Islamic Bank in Nigeria.⁵⁷⁵

⁵⁷⁵ *Godwin Sunday Ogboji v Governor of Central Bank Nigeria & Ors* (2011) Supra (Op. Cite.).

There is no special and separate law for IBF in Nigeria like the Islamic Banking Act 1983 of Malaysia (now Financial Services Act 2013).⁵⁷⁶ According to Sanusi,⁵⁷⁷ IB falls under the category of “specialized bank” recognized by the Bank and other Financial Institution ACT (BOFIA) No. 25, of 1991 (as amended).

He said Non-interest banking and financial models are generally divided into two; those based on Islamic commercial jurisprudence and the others based on any other established law on interest principle.⁵⁷⁸

The challenges faced by IBF in Nigeria are those of the lack of a special IBF law, lack of qualified judges to handle IBF matters in the High Courts, Court of Appeal and the Supreme courts, insufficient liquidity to establish such banks, religious cum political bias, inadequate public awareness. Taxation of car loans is another legal challenge as revealed in my interview with Babayo Saidu.⁵⁷⁹

“The issue of taxation of car loans is problematic. This is because IB does not offer cash loan and charge interest, rather, unlike conventional bank; it buys the car and sells it to the loan applicant on profit and repayment by installment. Both buying and selling transactions are taxed. That is double taxation on what is supposed to be seen as single transaction. Fortunately, a draft tax neutrality guideline has already been issued by the Federal Inland Revenue Service that when a situation like this arises the transaction will be considered a single one.”

Nigeria, with a population of one hundred and seventy three million (173,000,000), out of which one hundred million (100,000,000) are Muslims, still manages with a single and

⁵⁷⁶ Act number 276 of 1983.

⁵⁷⁷ Sanusi, L. S. (2011) Op. Cite., 7.

⁵⁷⁸ Ibid.

⁵⁷⁹ Bababayo Saidu, Head of the Islamic Bank Window at the Stanbick IBCC Bank (21st August, 2013, Abuja, Nigeria)

staggering fully fledged Islamic Bank, the Jaiz Bank. There is no special legislation for IBF and there is a dearth of qualified judges and justices to handle IBF litigations in the Common law based superior courts of record as Shari'ah courts have no jurisdiction to handle banking matters. However, due to single handed public awareness efforts of Sanusi, the suspended Central Bank Governor, 70% of the shareholders in the Jaiz Bank are non-Muslims. Yet there is the need for public awareness and amendment of laws to reflect the constitutional right of the Muslims to manage their economic, banking and financial activities in line with their religion. The Christians can equally claim this constitutional right given the parallel provisions in the Bible on usury as discussed above. IBF could be a source of peace, unity and prosperity to both Muslims and Christians and indeed Atheists as well.

4.9 Chapter Conclusion

The laws in both Christianity and Islam, pertaining to banking and commerce, have a common goal; the economic enhancement through non-exploitative transactions such as banking without riba (interest) and shunning harmful products. These are factors which should ordinarily unite Christians and Muslims; after all, even the whole world has embraced IBF notwithstanding religious and ethnic parities owing to its economic and social benefits as demonstrated in the discussions on Muslim majority and minority nations.

The opposition to I.B.F. in Nigeria is rooted on religious sentiments, rather than logical human reasoning, as there is nowhere in any of the mundane and spiritual laws where interest free banking is illegalized. The system is good for the society irrespective of religious creed as our common enemy is unemployment, poverty and crime which could be tackled through streamlining the Nigerian laws relating to I.B.F., for instance by appointing a Christian into the CBN and Jaiz Bank Shari'ah Advisory Councils, to make

it acceptable to non-Muslims as obtained in non-Muslim nations worldwide. This is one of the concerns of this research.

There should no longer be any need for disagreement on the subject as IBF operation in Nigeria is the constitutional right of both Muslims and Christians as ordained by their scriptures. After all, it is for their common economic and social good as poverty knows no inter-faith bounds.

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CHAPTER 5:
ALTERNATIVE DISPUTE
RESOLUTION (ADR) AS A SUPPLEMENT TO THE LIMITED IBF
ADJUDICATION RELATED PROVISIONS IN THE 1999 NIGERIAN
CONSTITUTION

5.1 Introduction

ADR is the name given to the out of court settlement mechanism for disputes between people.⁵⁸⁰ Right from time immemorial, dispute resolution has been practiced by humans of different generations because disputes are inevitable in their relationships. It has a range of processes for amicable resolution of disputes outside the formal court procedure or litigation where a neutral third party often intercedes to resolve the dispute.⁵⁸¹

Going by the legal adage justice delayed is justice denied, ADR would be a formidable tool in cushioning the effect of the lacunae in the Nigerian constitution where IBF related litigations are handled in the delay imbued courts and non-Shari'ah judges and justices. However, in a latest related development in Nigeria, Justice Zainab Bulkachiwa, President of the Federal Court of Appeal, Abuja, directed that, in line with Order 16 of the Court of Appeal Rules, litigants should try to settle out of court and whatever the outcome of the mediation will be the final decision of the court.⁵⁸² This was to save time and cost in litigations in Nigeria.

⁵⁸⁰ Rashid, S. K. (2004). Alternative Dispute Resolution in the Context of Islamic Law, *The Vindobona Journal of International Commercial Law and Arbitration*, Vol. 8, No. 1, 95.

⁵⁸¹ Oseni, U.A. (2013). Dispute Resolution in Islamic Finance: A Case Analysis of Malaysia. Paper Presented at 8th International Conference on Islamic Economics and Finance.

⁵⁸² Ameh Ejekwonyilo (2015), Appeal Court Introduces New Rules to Ensure Speedy Trials *Blueprint Magazine Monday, July 13, 2015* <http://www.blueprint.ng/2015/07/13/appeal-court-introduces-new-rules-to-ensure-speedy-trials/> Retrieved Tuesday, July 14, 2015

Sulh, ADR, is a very important aspect in the Shari'ah; the Qur'an, and, indeed, traditions of the Prophet, peace be upon him (PBUH), have indicated the virtues and reward that is due when believers choose to settle their disputes through it. It has been practically used by the companions of the Prophet (PBUH) to settle their differences. Through its use, lives and properties can be saved which are two important aspects of the principles of *maqasid al-shar'ah*. Similarly, marital relation which is the channel through which legitimacy is obtained can also be saved through the use of ADR. These reasons therefore show that ADR is a very important means of settling dispute relating to IBF. However, parties must ensure that they abide by the rules and regulations required by Shari'ah. Much as it is highly recommended and encouraged by the Shari'ah, it cannot be made a means of making lawful what Allah has made unlawful. This goes to show that it has limitations and any attempt to cross such line will make the entire process illegal and therefore void. This chapter, therefore, intends to look at ADR as an instrument through which the noble principles of the Shari'ah, relating to the protection of wealth and IBF, can be protected.

Since the Shari'ah, and hence the IBF institutions, normally consider legal proceedings as the last resort in settling customer disputes and since the Nigerian Constitution has not placed the Shari'ah courts with the jurisdiction to address issues that relate to it, the use of ADR will be an enormous panacea to this serious defect while efforts are being made to ensure arrest of the situation legislatively as discussed in chapter three. If ADR is utilized effectively, it can, *inter alia*, lead to the maintenance and protection of business relationship and that forms part of the cardinal principles of *maqasid al-Shari'ah*. This chapter therefore intends to examine ADR as a viable option towards cushioning the lacunae in the constitution relating to IBF litigations.

5.2 The Concept of ADR in Islam

Islamic law encourages people to always settle their disputes amicably. By nature people are bound to disagree but that should not be a ground for people to sore their relationships. One of the effective means of settlement of disputes is for them to settle their disputes amicably either by themselves without the intervention of a third party or through the intervention of a party who is not a party to the dispute appointed by the parties themselves or by another person for them with their consent, proxy.

There is a lot of dispute resolution mechanisms recognized under Islamic law. Each of the mechanisms is important and utilized in order to settle disputes between people⁵⁸³ or between persons and the state. The popular ways of settlement of dispute under the Shari'ah are *sulh* (conciliation) and *tahkim* (arbitration).⁵⁸⁴ The Islamic ADR mechanisms, which existed over 1400 years ago, derive their validity from the Qur'an, Sunna and other sources of Islamic law. The mechanisms exist over 1400 years back.⁵⁸⁵ Surprisingly, many believed that it originated from the West. Some African scholars claim that the concept originated from Africa and not the West. They argued that the use of community and religious leaders in the settlement of dispute amicably between parties is part and parcel of the African culture. This is further supported by the fact that some African communities never had institutionalized judicial systems; all that existed, to date, is customary communal, clan or family dispute resolution mechanisms.⁵⁸⁶

An important aspect of ADR in Islam is the fact that it must not contain terms that are contrary to Islamic principles. In other words, any term that attempts to make lawful what is unlawful and vice versa cannot stand. This principle is embodied in the celebrated

⁵⁸³ People includes personified legal orders such as Banks and Financial institutions

⁵⁸⁴ Ibid

⁵⁸⁵ For example *Ijma* (consensus opinion of Muslim jurists), *qiyas* (analogical deduction by Muslim jurist), *urf* and *adat* (custom and traditions of the people).

⁵⁸⁶ Jibueze, J. (2011). ADR had its Origins in Africa, *The Nation Newspaper* of 9/8/2011.

narration by Aisha that the Prophet (PBUH) said that whoever introduces into this religion what is foreign to it is rejected.⁵⁸⁷ This position is further buttressed in a celebrated letter which the second caliph of Islam Umar bin Khattab wrote to Abu Musa Al-Ash'ri after appointing him as a *qadi* (judge). It contained rules to guide him in deciding cases. One of these rules spelled out the wide span of coverage of amicable settlement of disputes. The exact words of Umar are:

“All types of compromise and conciliation among Muslims are permissible except those which make *haram* (unlawful) anything which is *halal* (lawful), and a *halal* as *haram*.”⁵⁸⁸

Despite the darkness that existed in Arabia before Islam, history has shown that the pre-Islam Arabs appreciated the use of ADR in settlement of their disputes. In one of such occasions, when the ka'aba was reconstructed, dispute arose amongst the Arab tribes as to who is to return the *hajara aswad* (the black stone) in its original position. Finally, they reached a consensus that the first person to enter the *ka'aba* (The Holy *Masjid* (Mosque) of *Makkah* (Mecca) will be the person to settle the dispute. Interestingly, the Prophet (PBUH) was the first to enter. He then placed the *hajara aswad* on a cloth and asked the leader of each tribe to hold an edge of the cloth and take it to its original position. And the prophet (PBUH) finally picked it and put it in the position it is supposed to be.⁵⁸⁹ This has clearly shown the important role ADR played in the settlement of the dispute because it could cost thousands lives since the Arabs of that time simply go for war for the slightest excuse.

⁵⁸⁷ Annawawi, A. Y.(1998). *Riyadussalihin*. Beirut: Daarul Fikri., 123.

⁵⁸⁸ Rashid S.K., (2008). Peculiarities and Religious Underlining of ADR in Islamic Law. *Paper presented at Mediation in the Asia Pacific: Constraints and Challenges Organised by Harun M. Hashim Law Centre, IIUM & Asia Pacific Mediation Forum, Australia Venue: IIUM, Kuala Lumpur*, 16-18 June, 2008.

⁵⁸⁹ Keshavjee, M. M. (2002). *Alternative Dispute Resolution: Its Resonance in Muslim Thought and Direction. A lecturer delivered at the Ismaili Centre Lecturer Series* on 2nd April, 2002, London, 6.

The ADR processes in Islamic law are based on the Qur'an and traditions of the prophet (PBUH) hence it has a religious undertone thereby demanding unquestionable compliance hence making it unique and unparalleled among the legal systems of the world.⁵⁹⁰ Since Islamic law covers every aspect of a Muslims life, a Muslim obeys the commands of Allah not just because of the worldly sanctions but because of the believe that he will stand in front of Allah on the day of judgment and he will be questioned on the way and manner he obeyed the commandments of Allah. If he obeys those commandments faithfully, he gets reward from Allah and if it is the opposite, severe punishment awaits him. Based on this fact, obedience enjoyed by Islamic law cannot be compared to that of any other legal system.⁵⁹¹

5.3 ADR Mechanisms under Islamic Law

Sulh is a very important component of ADR under Islamic law. The word *sulh* literally means “to cut off a dispute” or to “finish a dispute” either directly or through the help of a third party.⁵⁹² The Qur'an as the word of Allah that was revealed to mankind as guide and mercy has encouraged conciliation (*sulhu*) in several places the Qur'an states:

“The believers are but a single brotherhood, so make peace and reconciliation (*sulh*) between two (contending) brothers; and fear Allah, that ye may receive mercy”(Qur'an, al-Hujarat:10.).

⁵⁹⁰ Rashid, S. K. Op. Cite. 144.

⁵⁹¹ Ibid.

⁵⁹² Zahidul Islam, MD. (). Op. Cite., 34.

In yet another verse, the Qur'an ordered:

“If two parties among the believers fall into a quarrel, make ye peace between them.....with justice, and be fair: for Allah loves those who are fair (and just)”⁵⁹³

The Qur'an has indicated that there is no good in most of the conversations and meetings people hold except few, amongst the few acts of virtue mentioned, *Sulh* is included:

“No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah – then We are going to give him a great reward.”(Qur'an, Nisa: 114).

The Prophet (PBUH) equally advised, in an authentic hadith, that there is great reward attached to ADR. While counting the acts of piety, the prophet (PBUH) stated that making *sulhu* between two people is a *sadaq* (charity).⁵⁹⁴ Meaning it is an act of pity which Allah will reward handsomely. In Islam, lying is a prohibited act that invites the anger of Allah. Yet if it is with the aim of making *sulhu* between two people, Islam permits a person to lie. The Prophet said in an authentic *hadith* that was narrated by Um Kulthum bint Uqba that she heard Allah's Apostle (P.B.U.H) saying

‘He who makes peace (*sulh*) between the people by inventing good information or saying good things, is not a liar’.⁵⁹⁵

Reconciliation can only be crowned to success if the disputing parties agree to it..

The prophet (PBUH) said that where two Muslims refuse to speak to each other for more than three days, Allah will not accept their acts of piety until they reconcile.⁵⁹⁶ This hadith

⁵⁹³ Qur'an, al-Hujarat: 9.

⁵⁹⁴ Bukhari, vol. 3, hadith 857.

⁵⁹⁵ Muslim, vol. 8, hadith 338.

⁵⁹⁶ Muslim vol. 6, hadith 6213.

is indeed very important in laying a very proper foundation for reconciliation between people as it exalts the peace keepers, the arbitrators.

Tahkim (arbitration) is equally a very important aspect of ADR. The glorious Qur'an has advised with respect to marriage that before a husband finally pronounces divorce terminating the marital relationship, he is expected to take some certain steps one of which is the appointment of two arbiters (*hakamaini*) to reconcile them. The Qur'an states:

“If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators one from his family and the other from hers; if they both wish for peace, Allah will cause them reconciliation...” (Qur'an, an-Nisa 4:35).

Another authority from the Qur'an enshrines:

“By Allah, they will not believe until they make thee an arbitrator of what is in dispute between them and find within themselves no dislike of that which thou decide and submit with submission.”(Qur'an, an-Nisa 4:65).

The practice of arbitration is seen as a very important part of Islamic history. For instance, the conflict between Ali and Muawiyya on who was to become the khalifa was put to arbitration at the instance of Muawiyya. That was to show how important the companions have taken the issue of arbitration.⁵⁹⁷

There is no restriction as to the subject matter of arbitration under Islamic law. So long as it is not a matter that that will make lawful what is unlawful and *vice versa*. That means issues of IBF will properly be a subject of arbitration. The constitutional challenges facing Islamic banking will be significantly ameliorated by the adoption of the Islamic arbitration principle. A decision of the Supreme Court might however raise concern on whether or

⁵⁹⁷ Malkawi, B.H. (2013). The Feasibility of Alternative Dispute Resolution to Resolve Intellectual Property in Jordan. *Journal of Intellectual Property Law*, Vol. 8, No. 2, 146

not the superior courts will allow the Shari'ah courts arrange for arbitration on cases relating to IBF in accordance with Islamic law.

In *Opebiyi & Ors v. Noibi & Ors*, it was pronounced that a dispute over leadership succession cannot be submitted to arbitration. It is to be noted that though the community seeking to arbitrate its dispute in this case was wholly a Muslim community, no evidence of the existence of Islamic customary arbitration (Tahkim) was led in evidence before the court, as required by law when seeking to prove the existence of any custom.⁵⁹⁸

The hypothetical legal question arises that since Islamic law is not customary law⁵⁹⁹ and *Sulh* is a Qur'anic injunction on Muslims, can this Supreme Court decision be seen as not referring to the Islamic law *Sulh* but customary law leadership succession? The response could be positive considering the fact that complying with Quranic injunctions by Muslims is part of their worship as guaranteed by the constitution.⁶⁰⁰ This is an elementary legal fact which the Supreme Court could be deemed to have taken judicial notice about while taking that decision. Accordingly, it is legally and logically valid to hold the view that Islamic *Sulh* on matters affecting Muslim community, such as Muslim community leadership succession, is a constitutional right of the Nigerian Muslims and therefore valid notwithstanding this decision. There is the need for legislation on this and other similar issues to water down this Supreme Court (SC) decision on the qualities of an arbiter.

On the qualities of an arbiter, a letter written by Sayyidina Ali has clearly shown the qualities expected of them. He explained that justice must be done to people for the sake of Allah and as such people to be appointed as arbiters must be people with unquestionable character, superior caliber and meritorious record from the best in morals and merits

⁵⁹⁸ (1977) NSCC 464

⁵⁹⁹ *Alkamawa v Bello* (1998) 8 NWLR (Pt.561)173 where Wali JSC stated that Islamic law is not the same as customary law as it does not belong to any particular crime.

⁶⁰⁰ Section 38 CFRN 1999.

amongst people.⁶⁰¹ The Qur'an has therefore commanded the believers to give responsibilities to people that are supposed to discharge the responsibility effectively.

Allah says:

“Verily! Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice.”(Qur'an, an-Nisa 4:58).

The work of an arbiter is similar to that of a judge as such an arbiter should not be hasty in arriving at judgment neither should he delay in his decision.⁶⁰²

According to Hanafi School, the nature of arbitration is contractual in nature: an arbitrator acts as an agent on behalf of the disputed parties who appointed him. For this school, arbitration is closer to conciliation and hence the arbitral award has a lower level of abidingness than that of a court judgment. However, the contractual nature of the agreement would ultimately force the parties to agree to the decision of the arbitrators.⁶⁰³

According to *Maliki* School, being the constitutionally recognised school of Islamic jurisprudence in Nigeria, arbitrators can be chosen by any one of the parties and the arbitrator cannot be revoked in the middle of the proceedings.⁶⁰⁴ *Shafi'i* says that arbitration is not like a formal court proceeding and the arbitrators can be changed before they issue an arbitral award.

Hanbali narrates opposite opinion with *Shafi'i*. They says arbitration has the same effect as a court proceeding. Hence, the arbitrator shall have the same qualification as a judge and the award given by him is bound by the parties who chose him.⁶⁰⁵

⁶⁰¹ Zahidul Islam, MD, Op. Cite., 35.

⁶⁰² Zahidul Islam, MD. Op. Cite. 35.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid.

However, with respect to the use of fatwa in ADR, it is often the opinion of a single scholar which may not necessarily have any binding effect on the parties. However, if after the fatwa is given, the parties then sign agreeing to be bound by the decision of the Mufti, that will give such fatwa a heavier weight.⁶⁰⁶

ADR is a very important means of advancing the cause of *maqasid al-shari'ah* especially as it relates to the protection of wealth. This is because when parties are in a state of dispute which may eventually lead to the breakage of their relationship the use of ADR will therefore be important to preserve the business relationship. In the end, relationship is maintained and business transactions continuing thereby directly advancing the cause of *maqasid al-shari'ah* as it relates to business transactions.

The use of ADR in the settlement of disputes regarding business transactions is not without challenges. Where parties enter into contract, their primary concern is the making of profit. Where dispute arise and parties are asked to shift grounds so that the dispute ends with a 'win-win' result as against winner take all approach (if such dispute is settled in a court of law). The party who feels he has a good case will usually be the one to insist that he will not change his position or be ready for give and take because he feels when the dispute goes to the court, he will most likely succeed.

5.4 ADR in Nigerian Laws and its Application in IBF Matters as a Fill up for the Constitutional Lacunae

The Use of ADR in IBF litigations in Nigeria is a viable option towards addressing the shortcomings in the Nigerian constitution. In view of the pluralized nature of the Nigerian laws, with majority Muslim population whose religion prepares ADR to litigation, it

⁶⁰⁶ Rashid S.K., Op. Cite., 144.

becomes difficult to understand why such serious lacunae are allowed to continue.⁶⁰⁷ The court process in Nigeria, like most parts of the world, is predominantly litigation based. Most cases brought before the court undergo the normal and conventional litigation process. In view of the importance of ADR, the courts in Lagos and Kano⁶⁰⁸ states of Nigeria have now turned to the Multi-Door Courts (MDCs) system. Under this system where cases are brought before the High Court, the court first refers the case to an ADR judge who is appointed by the Chief Judge of the State to oversee all ADR cases in the State. Similarly, parties can, on their own, apply before the MDC for their cases to be settled through ADR. In both situations, the terms of settlement will be endorsed by the court as a sealed order of the court, hence having the weight of a court decision.⁶⁰⁹ Most states of the federation have laws that back the ADR process. For example in Kano state, the Kano State Arbitration Law, in addition to the Mediation and Arbitration Rules 2008, are all legislations towards the advancement of ADR in the state.⁶¹⁰

The use of MDC has numerous advantages. In the sense that Distrust of new and unfamiliar processes can be reduced because of the involvement and oversight of the judiciary a fuller range of choice or doors for resolving disputes are made available to litigants. For members of the judiciary, MDCs are means of decongesting their case load, allowing them more time to deal with other cases effectively thereby increasing productivity and improving access to justice for litigants. However, this research suggests that the Panel of judges or the MDC judge should be learned in both the Shari'ah and common law to avoid a vicious circle situation whereby the constitutional gap of judges without knowledge of the Shari'ah will be repeated.

⁶⁰⁷ Abikan, A.I. (2011). Islamic Banking Disputes: Between Judicial Pluralism and ADR, *Journal of Islamic Banking and Finance*, 12.

⁶⁰⁸ Kano State Rules of Civil Procedure.

⁶⁰⁹ The Multi-Door Courthouse Mediation and Arbitration Rules 2003Lagos state.

⁶¹⁰ Sections 22 and 116 Kano State Arbitration Law.

Since the position of the Constitution is clear to the effect that the Federal High court is the court with jurisdiction to entertain matters of IBF, the use of the MDCs is indispensable on disputes arising from it.

If a settlement of the dispute is reached, it shall be reduced to writing and signed by the parties and or their counsels. A settlement agreement executed by the parties at an ADR Session is deemed to be an offer to settle which is accepted within the meaning of the High Court Rule.⁶¹¹

The Nigerian Federal High Court (Civil Procedure) Rules 2009 provides:

“1. (1) When a matter comes before the court for the first time, the judge shall, in circumstances where it is appropriate, grant to the parties, time, not more than thirty days within which parties may explore possibilities for the settlement of the disputes.”

The above provision shows the relevance of ADR in IBF matters as the Federal High Court itself, which is the court constitutionally vested with its jurisdiction, emphasise it in its procedural Rules.

In Malaysia, the Chief Justice issued Practice Direction No. 5 of 2010 on Mediation to encourage parties to use mediation in all types of disputes in the Malaysian courts.⁶¹²

Also in Malaysia, ADR is done through the KLCMC (Kuala Lumpur Court Mediation Centre), KLRCA (Kuala Lumpur Regional Centre for Arbitration) and FMB (Financial Mediation Bureau). In Nigeria, it is done through Arbitration only.⁶¹³ Accordingly, Malaysia, as the pacesetter of the system, its ADR style is worth emulation by Nigeria as

⁶¹¹ Order 38 of the Rules of Civil Procedure of Lagos State.

⁶¹² <http://library.kehakiman.gov.my/digital/Arahan%20Amalan%20Dan%20Nota%20Amalan/Practice%20Direction%20No.%205%20Of%202010.pdf> Accessed September 1, 2016.

⁶¹³ Oseni, U. A. (2012) Dispute resolution in the Islamic finance industry in Nigeria *European Journal of Law and Economics*, 13.

a tool for complementing the effort of this research to fill the constitutional gaps on the subject.

Whether bank business is in accordance with the religion of Islam needs consideration by eminent jurists who are properly qualified in Islamic jurisprudence. This is a principle of Islamic jurisprudence itself. One must have the proper qualifications in Islamic finance and Islamic law before one can make pronouncements on matters regarding both. This is why arbitration is recommended for disputes on Islamic finance, as will later be explained.

Under s. 3(5) (b) of the Islamic Banking Act 1983, no Islamic banking licence can be issued unless the applicant's articles provide for a Sharia advisory body to advise the bank. The aim of this is to ensure that transactions do not involve any element which is not approved by the Religion of Islam. Additionally, a central Sharia Advisory Council, the BNM SAC, was established in Bank Negara Malaysia in 2003 as an authority on Islamic law for Islamic banking business and other matters in accordance with s. 16B of the Central Bank of Malaysia Act 1958.

I interviewed Dr Abdul Aziz Ma'aruf Olayemi on the 5th of May, 2015 at the University of Malaya. He is a Nigerian Lawyer and Post-Doctoral researcher on Sharia in the Department of Sharia and Law, Academy of Islamic Studies, University of Malaya. He made the following contribution:

“ADR can be used to solve the problem of lack of jurisdiction of our learned Sharia judges in IBF litigations. However, let there be Arbitration Clause in all IBF contracts.”

5.6 ADR in IBF Promotes the Concept of *Maqasid As-Shari'ah* as it relates to the Protection of Wealth:

Maqasid al-Shari'ah refers to those noble principles that serve as the backbone or most important principles which the Shari'ah is out to protect. Nobody is allowed to interfere with the right of another with respect to all the matters raised under the *maqasid al-Shari'ah* and an Islamic state or a Muslim community in a secular state, must ensure that it calls to order any person that attempts to do such. The constitutional right of the Nigerian Muslim, and indeed the Christian as well, to have his or her commercial activities in line with his religion, should be enhanced.

Property or wealth is a very important aspect of the life of man. People struggle in their lives just to ensure that they get a lot of wealth. The Qur'an has acknowledged the fact that wealth is part and parcel of the adornment of this world:

“Wealth and children are [but] adornment of the worldly life. But the enduring good deeds are better to your Lord for reward and better for [one's] hope.”⁶¹⁴(Qur'an, Kahf: 46).

In the struggle to acquire wealth, Islam has warned believers to stay away from illegal means of acquisition of wealth. Allah enjoins:

“O ye who believe! Eat not up your property among yourselves in vanities; but let there be among you traffic and trade by mutual good-will.”(Qur'an, An-Nisa 4:29).

There are several acts that are designated as illegal and as such must be avoided by believers. For example the Qur'an and Sunnah have warned believers to stay away from usury (*riba*). It has been defined as an increase or excess which, in an exchange or sale of a commodity, accrues to the owner (lender) without giving in return any equivalent

⁶¹⁴ Qur'an, Kahf: 46.

counter-value or recompense to the other party.⁶¹⁵ The glorious Qur'an has in several places mentioned the position of Islam on *riba*. Some of the provisions mentioned *riba* negatively but did not make express prohibition while others expressly state the prohibition of *riba*. The Qur'an explains:

“And whatever you lay out with the people in order to obtain an increased return, this increases you nothing with Allah, but whatever you give in alms, seeking Allah's pleasure, it is those who receive multiplied recompense.”(Qur'an, ar-Rum: 39).

The Qur'an narrates further thus:

“Because of the sinfulness of the Jews, We have forbidden to them certain good things that were permitted to them, and for their hindering many from Allah's Way. And for their taking *riba*, though they were forbidden, and that they devoured people's wealth in falsehood, and We have prepared for the unbelievers among them a grievous chastisement.”(Qur'an Al-Nisa: 160-161).

The express prohibition of *riba* in the Qur'an follows:

“O you who believe! Do not devour *riba* multiplying it over, and keep your duty to Allah that you may prosper.”(Qur'an, ali-Imran: 130).

The Qur'an, therefore, directs:

“Those who devour *riba* will not stand except as one whom Satan has driven to madness by his touch will stand. That is because they say: ‘Trading is like *riba*’, and Allah has allowed trading and forbidden *riba*. So to whoever takes the admonition from his Lord, then he desists, he shall be pardoned for the past, and his affair is committed to Allah, but whoever reverts, those are the

⁶¹⁵ Chapra, M.U. (2006). The Nature of Riba in Islam. *The Journal of Islamic Economy and Finance*, V. 2, 1, 10.

inhabitants of the Fire, to dwell therein forever. Allah will deprive *riba* of all blessing, and will give increase for deeds of charity; for Allah does not love any ungrateful sinner. Surely those who believe and do righteous deeds and establish prayer and pay alms, they shall have their reward with their Lord, and they shall have no fear, nor shall they sorrow. O you who believe! Keep your duty to Allah, and relinquish whatever remains from *riba* if you are indeed believers. But you do not, than be warned of a war from Allah and His Messenger, yet if you repent you shall have your capital fairly. And if the debtor is in difficulty grant him time until it is easier for him to repay, but if you are able, write off the debt as an act of charity, it would be better for you, if only you knew. And guard yourself against a Day in which you will be brought back to Allah, then every soul shall be recompensed in all fairness for what it has earned, and none shall be dealt with unjustly.”

(Qur'an, al-Baqarah 2:275-281).

Other examples of illegal means of acquisition of wealth under Islamic law, as they relate to IBF, are theft, robbery and bribery (corruption). It prescribes:

“[As for] the thief, the male and the female, amputate their hands in recompense for what they earned [i.e., committed] as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise. But whoever repents after his wrongdoing and reforms, indeed, Allah will turn to him in forgiveness. Indeed, Allah is Forgiving and Merciful.”⁶¹⁶

It is however important to mention that there are certain conditions that must be fulfilled before the hands of a thief can be amputated.⁶¹⁷ The property stolen must reach the *nasab*

⁶¹⁶ Qur'an, Maidah: 38-39.

⁶¹⁷ Doi I.A., (1984). Op. Cite., 201.

(minimum requirement) before amputation can take place.⁶¹⁸ This is in addition to the fact that the property must not have been placed in trust with the thief and the property stolen must have been kept in a safe place.⁶¹⁹ It is important to mention that the amputation will not be done if the thief is pushed by hunger to steal the property.⁶²⁰ During the reign of Umar (AS) the application of *hadd* punishment for theft was suspended due to famine that devastated the Islamic state.⁶²¹

In the case of armed robbery a more severe punishment was prescribed by the Qur'an, in fact the Qur'an described it as waging war against Allah and his Messenger. The Qur'an states

“Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment,”(Qur'an, Maidah:33).

It was related that this verse was revealed when an Arab tribe came to the Prophet and claimed to have embraced Islam. Unfamiliar with the water and weather of Madina, they fell sick and the Prophet (PBUH) ordered that they should be taken outside Madina and be given the milk and urine of some camels. When they recovered from their illness, they killed the shepherd and went away with the camels. Then Allah revealed the verses that set the punishment for armed robbery.⁶²² Unlike theft and armed robbery, the Qur'an has

⁶¹⁸ Ibid

⁶¹⁹ Ibid

⁶²⁰ Bambale, Y.Y., (2003). *Crimes and Punishment Under Islamic Law*. Ibadan: Malthouse Law Books, 82.

⁶²¹ Ibid

⁶²² Shakir, A., (2005). *Umdatul At-Tafsir An Hafiz Ibn Kathir* Vol. 1, Al-Mansuratu: Ar Elwafa', 230.

not prescribed any worldly punishment for bribery. The Qur'an has condemned bribery and has described it as an illegal means of acquisition of wealth:

“And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].” (Qur'an, al-Baqarah: 188).

A look at the history of Islam reveals that the prophet (PBUH) himself and some of his rightly guided caliphs were businessmen. It was related that the Prophet's first wife Khadijah was a businesswoman. She engaged the Prophet in her business where he travels between Mecca and Syria. In fact, she fell in love with the Prophet (PBUH) as a result of his honesty and offered herself in marriage to the prophet (PBUH) which he accepted after consulting his uncle Abdul Mutallib.⁶²³ Similarly, Abubakar Assiddiq the first caliph was a successful businessman. He goes to sham (Syria) for business activities. Uthman the third Caliph was, as well, a very rich merchant.⁶²⁴ His wealth was a blessing to the *ummah* because he assisted the Muslims in various ways during their trying moments.⁶²⁵

If ADR is promoted, with respect to IBF, it will lead to the preservation of wealth which is an element of the concept of *Maqasid al-Shari'ah*. It enhances relationships and hence maintains business continuity in IBF. In addition to the maintenance of business relationship, it leads to the preservation of wealth through prevention of cheating and other economic crimes. ADR in IBF in Nigeria can even assist in tackling the Boko Haram terrorism which is shown in chapter two as being fueled by poverty.

⁶²³ She was the first wife of the prophet and the mother of most of the children of the Prophet (PBUH). It was related that, due to the prophet's sincerity, Khadija fell in love with the prophet and offered to marry him. The Prophet accepted the offer and their marriage were conducted. Saleem, H.M., (2012), Justification of the marriages of the Beloved Prophet. *Pakistan Journal of Islamic Research*, V. 9, 3.

⁶²⁴ Sallabi A.M, (nd). *The Biography of Uthman bin Affan*, Pakistan: Darussalam, nd (no date), 20.

⁶²⁵ Ibid.

The position of Islamic law is clear to the effect that believers are allowed and encouraged to engage in all lawful forms of transaction. Believers must however ensure that they do not engage in all forms of fraudulent and other illegalities in their business transactions. ADR is therefore an important channel for the preservation of wealth which is a cardinal principle of *maqasidu al-Shari'ah*.

5.7 Chapter Conclusion

Based on the analysis on a provision of the Quran on reconciliation (Quran Al-Hujurat: 10), ADR is an encouraged act under Islamic law. In the context of this thesis, it is logical that since ADR improves relationships through amicable settlements, and since Christians are more involved in IBF through their majority share holding in the Jaiz Bank, the use of ADR, therefore, enhances harmony. It will also harmonise the heated debate for and against it in Nigeria.

The Qur'an and the traditions of the Prophet (PBUH) have in various places encouraged it. This is not unconnected with the fact that it adopts a 'win-win' approach to disputes. However, Islam requires that parties abide by the rules otherwise it will not be valid in the eyes of the law. Any settlement that tends to make lawful what Allah has made unlawful cannot be valid. The use of ADR in the advancement of the cause of *maqasid al-shari'ah* needs not be over emphasized as it keeps business relations going and relationships intact. It will therefore be appropriate to suggest that governments should enlighten the public, especially those in the business sector, of the noble principles of Islamic law concerning ADR and when disputes are brought before the courts, the courts must start by referring the parties to out of court settlement before the normal court process if necessary.

The protection of wealth is one of the principles of *maqasid al-shari'ah*. Therefore Islamic law is firm in ensuring that the wealth of all is protected. Any attempt by any person or group of persons to deny the right of others to the enjoyment of their wealth, in

accordance with their religion, may be, violently, resisted by the Muslims in Nigeria. This is what this research seeks to prevent.

Wealth is acknowledged as an adornment of this world by the Glorious Qur'an. It is therefore not surprising that human beings strive hard to earn wealth. The Qur'an and traditions of the prophet (PBUH) have encouraged believers to engage in lawful business. The blessings of Allah will always be on the person or individual that strives in order to make a lawful livelihood. All forms of illegal means of acquisition of wealth must be avoided. Fraud and other forms of illegalities are *haram* and as such the believers are obliged to stay away from them. As stated above, business transactions involving usury is prohibited by express provisions of the Qur'an and authentic traditions of the Prophet (PBUH).

Most of the reported cases on IBF involve non-performance of the bank's customer by defaulting payment due under *bay' bi thaman 'ājil* (BBA or deferred payment sale), *ijārah* (lease or rent), and *bay' istisnā'* (manufacturing contract).⁶²⁶ This signals the need for treatment of such cases through ADR manned by experts in Islamic law rather than Federal High Court Judges and the superior court justices with little or no knowledge of general Islamic law. After all, compromise is better than court cases both in Malaysia and Nigeria.⁶²⁷

⁶²⁶ Buang, A. H. (2007) Op. Cit., 325.

⁶²⁷ Ibid, 340.

CHAPTER 6: SUMMARY, RESEARCH FINDINGS AND RECOMMENDATIONS

6.1 Chapter Introduction

A library research was embarked upon demonstrating the legal framework, the constitutional lacunae and the hypotheses for filling the gaps regarding IBF and the role of *Sulh* (ADR) in the system. Bridging the schism between the majority Muslims and the minority Christians in Nigeria on IBF through the same system also formed significant component of the research. The indubitable fact that the Quran is the bedrock of the Shari'ah, and hence IBF laws, is also proven in this thesis. So also is the fact that the scriptures have concurred on the subject, discussed in chapter four, thus making IBF the constitutional right of both the Muslims and the Christians in Nigeria. Conventional banking products on whose invalidity the Qur'an is silent, such as *ibahah* (sales of futures and option), should be left as valid thus uniting the duo systems of banking representing the two faiths. The legal framework and challenges to the system at various countries were also studied to serve as a guide to the Nigerian nascent IBF operations.

Hypotheses were made on the necessity to have a comprehensive legislative framework that will enable Nigerians to explore the potentials of the system as vital mechanism for attaining peace, unity and prosperity in the religious insurgency inflicted nation. The insurgency has become a canker-worm which has already eaten deep into the very fabric of the nation's economic, social and political stability to which IBF is hereby academically nominated and hypothesized to proffer panacea or, at least, partake in ameliorating the insurgency, disunity and poverty situation in Nigeria.

6.2 Summary

The idea of Islamic Banking and Finance [IBF] in Nigeria has been pressed for by Muslims for its faith based approach to banking. It stands out as a challenge to the conventional form of financial intermediation that is based on profit motive with lesser moral value. Islamic Banking is market driven but with a moral dimension based on the Islamic value system. The situation is analogous to the prohibition of adoption by the Quran and the permission of same by the Child's Right Act of Nigeria. Riba, interests, are prohibited by the Quran and permitted by the BOFIA. The argument on the validity of Islamic banking in Nigeria is a problem that has generated hot debate, the Constitution of the Federal Republic of Nigeria has been the basis for such debate as climaxed by an Abuja Federal High Court decision which, by *obiter dicta*, declared illegal the License of the Jaiz Bank PLC, the only fully pledged Islamic Bank in Nigeria. Those in support of Islamic banking claim that Islamic banking falls under the constitutional guarantee of the right to religion while those opposing the banking system postulate that establishing Islamic banking contradicts the constitutional provision against state religion and discrimination based on faith. This research therefore analyzed the Constitutional lacunae relating to IBF and examines the use of ADR as an option while move is being made to rectify the constitutional lacuna. Similarly, provisions of the Constitution that come into play when mention is made of IBF with the objective of making clear whether or not it a constitutional right of the majority Nigerian Muslims and the Christians were discussed.

Islamic law by definition and concept is the natural order established by Allah for mankind to achieve balance, justice and equity not only for men but also for all things created by Allah material and non-material. It is a whole system that does not give room for selective appreciation of nature. The aim of Shari'ah is to use truth in arriving at justice through the progressive use of the rules and principles of adjudication. Shari'ah conceives

the human life in its totality and as such gives guidance in all aspects of human endeavor so as to enhance worship, which includes human co-existence in peace, unity and prosperity as symbolized by the IBF system. Shari'ah is therefore more of a code of religious duties in every aspect of private and public field which guaranteed its authority and the unity of Muslims along with non-Muslims despite their great diversity.

The urge for IBF to govern the economic affairs of Muslims is enshrined in the constitutional right to religion and worship under section 38, 1999 Nigerian Constitution. Usury, the main prohibition in IBF transactions is equally prohibited in both the New and Old Testaments of the Christian and Jewish faiths. This coupled with the fact that 60% of the shareholders of the Nigerian only fully pledged IB, The Jaiz Bank; this thesis hypothesized the use of IBF as a bridge to unite the two religions for peace, prosperity and unity of the country. IBF stands as a force to be reckoned with in the pursuit of this unifying ambition.

For the true Muslims, recognizing the laws in the Bible, as revealed to Prophet Isa (Jesus), is *sine quo non* to the Islamic faith. For true Christians and philosophers, the Prophet Muhammad is a Prophet of Allah and one of the, if not the most, greatest and influential men in human history. The Quran, as the grand and primary source of the Shari'ah and consequently that of IBF laws, could be used as a tool for uniting the Muslims and Christians in Nigeria through demonstrating its legal provisions *vis-à-vis* the Bible as regards the dos and don'ts in the IBF system. A subsidiary source of the Shari'ah called 'Shara'i Man Qablana (The revealed laws before Islam) symbolizes the legal nexus between the Islamic law (the Shari'ah) and the other faiths of the books (*Ahlul Kitab*), Christianity and Judaism.

Nigeria due to its diversity and legal pluralism has a complex legal system which consist of English, customary and Islamic laws as the sources of laws. Due to the early contact of

the southern part of Nigeria with the western colonialists, the southern part of the country has been greatly influenced by English law and Christianity in addition to the pre-colonially existent customary laws. The north, particularly Borno and Yobe states, on the other hand, had contact with Islam as far back as the 9th Century and hence the predominance of Shari'ah in the Region. The Governor of Central Bank of Nigeria announced on Monday, June 20, 2011, at a Conference on Islamic Banking in Dakar, Senegal, that it had issued Jaiz International Bank PLC an Approval in-Principle, as the first fully pledged Islamic Bank in the country. He had earlier, in January 13, 2011, approved for the Bank to carry on business as a Profit and Loss Sharing Bank and issued a Framework on Non-Interest Financial Institutions (NIFI). It was approved by the National legislature and has a 60% non-Muslim patronage. The government approved the establishment of IBF after the CBN Governor, Sanusi, convinced the parliament and the finance Minister that non-Muslims are also free to interact with the bank as exemplified by USA and Britain. Some objective clergy men of the two faiths are also partaking in this, all important, awareness campaign.

IBF, otherwise referred to as non interest banking and finance, has gained popularity across the globe from both Muslims and non-Muslims. It is an alternative form of financial intermediation that is based on the Islamic value system, it is not the only form of profit and loss sharing bank based on non interest principles, but it is the most developed form that has international acceptance and recognition. Undoubtedly, IBF is based on a religious law; it is indeed not a religious product or service that is exclusively meant for a people of a particular creed. It is universally accessible to and enjoyed by people of diverse religious persuasions or ethical beliefs across the globe.

In Europe, France in particular, where there is a considerable Arab Muslim population because of their colonial relationship, the question is no longer how to establish an Islamic

state or Islamize positive laws, but how to interpret and practice a ‘law’ that is not backed by a state. Shari’ah revolves around two poles in France. On the one hand, we have the *salafī* Shari’a discourse, framing Shari’a as morality ‘oriented towards a code’. On the other, we have the discourse on Shari’a whereby Shari’a has been ‘ethicized’, that is, where it is no longer framed as a law, assuming instead the form of religious ethics.

In Nigeria, Banks and other Financial Institutions Act 1991 (BOFIA) is the key law granting license to IB. A careful perusal of the law reveals that no mention was made in the law of the term “IB”. In fact, the Act in clear terms subjects to registration or incorporation of the following banks to the written consent of the Governor of the Central Bank thus Central, Federal, Federation, National, Nigeria, Reserve, State, Christian, Islamic, Muslim, Qur’anic or Biblical. The Central Bank relying on this provision issued a circular which proposes to prohibit the use of the phrase “IB”

On the contrary, the Act has not, totally, prohibited the use of the word IB rather it restricts and subjects its usage to a prior consent and approval of the Governor of the Central Bank. Each of such application is expected to be treated on its merit. Approval should be granted if the application is shown to be the aspiration of the majority shareholders and the bank also satisfies all the prerequisites of licensed bank. Whether or not the word IB is used, to the Muslim, the end justifies the means. Under Islamic law, actions are judged according to intentions. Since the bank operates on the Islamic principle of profit and loss sharing, avoidance of unlawful or forbidden property like wine, pigs, corpse, human blood and *riba*, a Muslim will be rewarded by the Almighty for his transactions in lawful acts. It is therefore appropriate to say that supporting IB is not just a promising venture but also an act of piety that attracts the blessings of the Almighty.

Following the introduction of IBF in Nigeria by the Central Bank of Nigeria in 2011, as stated above, many issues came to the limelight and needed to be addressed. One of such

problems is the issue of the court that is supposed to handle litigations relating to the issue of IBF. The Constitution of Nigeria 1999 which predates the coming of IBF did not make clear the jurisdiction of the Shari'ah Court of Appeal as it relates to it. Naturally, since the constitution did not contemplate, it will not be surprising to witness such lacuna in the Constitution. After all, it is the grand norm (in jurisprudential language), the source from which other laws derive their validity and hence cannot provide for everything in detail.

The provisions of BOFIA, however, relates to the guidelines that relate to the establishment of Banks and the manner of operation of the same. Issues that concern jurisdiction of courts are always left to the law creating the courts. Since the Shari'ah Court of Appeal is a creation of the Constitution, it has made provisions for its jurisdiction. It equally states that the Federal and State High Courts are the courts vested with the jurisdiction to try cases relating to banking disputes. IB which is a form of banking that is built upon the Islamic principles of *Mudarabah* (partnership) requires persons with knowledge of Islamic principles to adjudicate on such disputes. Knowing fully well that judges of the Federal High Court and State High Courts are not trained in Islamic law make it clear that they cannot handle cases of IBF effectively. An issue of concern, when such cases are handled by the judges of the Shari'ah Court of Appeal and other Shari'ah judges, is that most of them have not received training on the banking laws.

Alternative Dispute Resolution is a very important aspect under the Shari'ah. The Qur'an and indeed traditions of the Prophet (PBUH) have indicated the virtues and reward that is due when believers choose to settle their disputes through ADR. ADR has been practically used by the companions of the Prophet (PBUH) to settle their differences. Through the use of ADR lives and properties can be saved which are two important aspects of the principles of *maqasid al-Shari'ah*. It can therefore be used in settling IBF matters out of court thus saving the good relationship, money and time of the parties. These reasons therefore show

that ADR is a very important means of advancing the cause of *maqasid al-shari'ah* and hence protection of the stake holders in the IBF system. In making ADR, parties must ensure that they abide by the rules and regulations required by Shari'ah. Much as ADR is highly recommended and encouraged by the Shari'ah, it cannot be made a means of making lawful what Allah has made unlawful. This goes to show that ADR has limitations and any attempt to cross such line will make the entire process illegal and therefore void in the eyes of the Shari'ah. This thesis therefore looked at ADR as an instrument through which the noble principles of the Shari'ah relating to the protection of wealth can be protected

6.3.1 Research Findings

Despite the enactment of the BOFID, BOFIA and the Central Bank Acts the dearth still persists on a comprehensive legislation on IBF in Nigeria. There is the need for the Malaysian type Financial Institutions Act, 2013 to separately regulate IBF issues.

The Supremacy of the Constitution, right to worship and the Jurisdiction of the Shari'ah Courts, as enshrined in the constitution, as well as, the powers of the Central Bank Governor under the BOFIA, need to be reviewed. This is to create conducive legal atmosphere for the establishment and smooth operations of the IBF system in Nigeria.

The right of non-Muslims to invest and interact with IBF institutions as well as Muslims' right to run their economic affairs through IBF need clear legal backing. It is found that since the Qur'an, the Bible and Torah have concurred on the prohibition of usury and cheating, IBF can be used as a bridge to unite Muslims and Christians in Nigeria. This is buttressed by the fact that 60% of the Shareholders of Jaiz Bank are Christians because of its economic benefit.

Alternative Dispute Resolution is a very important aspect under the Shari'ah. The Qur'an and indeed traditions of the Prophet (PBUH) have indicated the virtues and reward that is

due when believers choose to settle their disputes through ADR. It can supplement the constitution by settling IBF disputes through it before and after the suggested amendments in chapter three are done. This finding is buttressed by my interview with Dr Abdul Azeez and the views of Abdul Qadr and Oseni.

The argument on the validity of IBF in Nigeria is a problem that has generated hot debate, the Constitution of the Federal Republic of Nigeria has been the basis for such debate. Those in support claim that it falls under the constitutional guarantee of the right to religion under section 38. Those opposing the system postulate that establishing it contradicts the constitutional provision against state religion under section 10 and discrimination based on faith under section 42(1) of the constitution.

In Nigeria, Banks and Other Financial Institutions Act 1991 (BOFIA) is the key law granting license to IBF. A careful perusal of the law reveals that there was no clear mention was made in the law of the term "IBF". In fact, the Act in clear terms subjects to registration or incorporation of the following banks to the written consent of the Governor of the Central Bank thus Central, Federal, Federation, National, Nigeria, Reserve, State, Christian, Islamic, Muslim, Qur'anic or Biblical. The Central Bank relying on this provision issued a circular which proposes to prohibit the use of the phrase "IB"

It is found that the BOFIA has not prohibited the use of the word IB rather it restricts and subjects its usage to a prior consent and approval of the Governor of the Central Bank. Each of such application is expected to be treated on its merit. Approval should be granted if the application is shown to be the aspiration of the majority shareholders and the bank also satisfies all the prerequisites of licensed bank.

Whether or not the word IB is used, to the Muslim, the end justifies the means. Under Islamic law, actions are judged according to intentions. Since the bank operates on the

Islamic principle of profit and loss sharing, avoidance of unlawful or forbidden property like wine, pigs, corpse, human blood and *Riba*.

It is therefore found that since Nigeria has already have a fully pledged IB, if the suggested enactment of a special IBF law, comprising ADR procedure in IBF disputes, is made, Shari'ah court Jurisdictions enhanced and all relevant legislations amended and streamlined, the IBF system will go a long way in ensuring peace, unity and prosperity of the Muslim majority nation.

Philosophically, this research finds that since humans are so endowed with knowledge that they can fly much faster and higher than birds and see live the happenings at the other end of the world, laws regulating IBF can be streamlined and modeled to make the system a formidable machinery for peace, unity and prosperity in Nigeria and the world in general. This can be achieved irrespective of societal political, economic, religious and socio-cultural peculiarities.

6.3.2 Summary of the Findings

It was found, through doctrinal methodology, that despite the enactment of the BOFID, BOFIA and the Central Bank Acts, the dearth still persists on a comprehensive legislation on IBF in Nigeria. The Malaysian type, FSA 2013, is necessary as explained, inter alia, by Buang, A.H. Twenty one provisions of the constitution related to litigations in IBF matters need amendments. These are Sections 1(3), 288(2)(a), 10, 16 (1) (d), 38, 42 and 4(1)(6), 233, 244 (2) (b), 247 (1), 231(3), 238(3), 250(3), 256(3), 271(3), 261, 288(1)(2)(a), 276, 262, 277(1)(2) and 251(1)(d)(j)

Doctrinal research and an interviewee show that Since the Qur'an and Bible have concurred on the prohibition of usury and cheating, IBF can be used as a bridge to unite Muslims and Christians in Nigeria

By Sections 38 and 16(1)(d) of the Nigerian Constitution, scriptural provisions on the subject can be used as grounds for declaring interest free transactions as part of worship and therefore a constitutional right of the *Ahlul Kitab* (the people of the book (Muslims, Christians and the Jews)).

Although the Banks and other Financial Institutions Act (BOFIA) 1991 and CBN Act (S. 33) are the laws on granting license to IBF, the question of who possesses the power to issue such license needs clarification. This is to forestall the prospective danger posed by the decision in *Godwin vs. CBN Governor*.

IBF can be streamlined and modeled to make the system formidable machinery for peace, unity and prosperity in Nigeria and the world in general. This is buttressed by the 60% patronage of Jaiz Bank in Nigeria as revealed by Sanusi and others.

It is also found that ADR can cushion the effect of the paucity in the constitution concerning litigations on IBF matters; this tally with views of Abdul Aziz, Oseni and AbdulQadir.

6.4 Research Contributions

This thesis will enormously impact on the advancement of the frontiers of research in the field of comparative, constitutional, IBF laws in Nigeria and other jurisdictions worldwide.

The reasons are as follows:

6.4.1 Much closer look at the dearth in the constitution was made and far reaching panacea proffered, such as amendments to the constitution and enactment of a specialised Act.

6.4.2 Enhancement of Muslim – Christian relationship through economic collaboration based on scriptural concurrence about IBF and constitutional right to worship and conduct legitimate business

6.4.3 Contribute in the research on ADR, especially, the Multi-Door Courts (MDCs) system and the Malaysian KLCMC (Kuala Lumpur Court Mediation Centre), KLRCA (Kuala Lumpur Regional Centre for Arbitration) and FMB (Financial Mediation Bureau). This is to cushion the effect of the lacunae in the constitution delay in litigations for the promotion of justice delivery in the nation as justice delayed is justice denied. This will also encourage governmental political will to promote the system.

6.5 Recommendations

From the foregoing conclusions, the following propositions are put forward with the optimism that it will facilitate the reinvigoration and strengthening of the existing legal framework in the operations of, and litigations on, IBF in Nigeria as well as for future research on the subject.

This could be achieved through the method of identifying the legally based complaints against IBF and proffering legal solutions by resorting to provisional statutory amendments if constitutional amendments will take time, mass mobilization and Scriptural legal provisions as they provide a coherence platform for the removal of religious bias in this subject. This is *sine quo non* to the desired success of IBF in Nigeria. The recommendations are as follows:

6.5.1 All the constitutional amendments suggested in chapter three should be effected to solve current jurisdictional problems and to forestall future legal obstacles.

6.5.2 The power of the Governor of the Central Bank, under BOFIA and the Central Bank Act (CBA), to issue license to Non-Interest banks should be clarified. This is to avoid cancellation of such licenses as attempted in the case of *Sunday vs CBN and 2 others* as discussed in chapters three and four.

6.5.3 There is the need for a specialized legal and regulatory framework for IBF. As parities exist between the Islamic and the conventional banking and finance systems, it is

natural, fair and logical that there should be a *lex specialis* (specialized law) to lay down a sound foundation for the operation of IB to complement existing legal and regulatory infrastructure. It should be liberated from the marriage of legal framework with conventional Bank regulations and should be permitted to transact outside that. Example, in Malaysia, Act number 276 of 1983 merged the IBA 1983 and the Takaful Act 1984 into a single FSA 2013. This is worthy of emulation by Nigeria

6.5.4 Establish the Malaysian type Muamalat Bench in the High Court and the superior Federal courts⁶²⁸

6.5.5 Judges must have special training at the National Judicial Institute on deciding IBF matters. Suggestion is made on using experts on the field worldwide, especially from Malaysia, the global hub of IBF.

6.5.6 As some universities in Nigeria have now introduced IBF in their curriculum, there should be a special course to cater for its legal aspects in the law faculty and the Nigerian Law Schools.

6.5.7 The Dubai DWIFA model on ADR should also be adopted. It should have full powers to enforce its decision.

6.5.8 Civil Courts should consult Shari'ah Judges and Kadis just as they do with the National Shari'ah Advisory Council in Malaysia.⁶²⁹

6.5.9 Although the entire thesis and the above recommendations are towards legally strengthening IBF to further harmonise Nigerians in patronizing the system across religious differences:

⁶²⁸ Buang, A. H. Ibid., 339.

⁶²⁹ Ibid. 322.

6.5.9.1 Government should capitalize on the potentials of the system, as an inter-faith bridge builder, to boost its efforts in national unity.

6.5.9.2 The Jaiz Bank, whose patronage is 60% Christians,⁶³⁰ should urge its majority Christian share holders to convince other Christians, especially their leaders, that IBF is not about Islamising the nation but about mutual economic benefits. This will reduce the Islamaphobia affecting the system.

6.6 Further Research

6.6.1 Drafting of the proposed IBF Act

6.6.2 Drafting amendments to the existing legal framework as a prelude to drafting the main IBF Act and to streamline IBF window activities in conventional Banks.

6.6.3 Drawing a curriculum for the training of Bank executives, Judges, Kadis, Lawyers and other stake holders in IBF operations and litigations.

6.7 Chapter Conclusion

From the foregoing analyses of the Nigerian laws regulating the IBF mechanism, especially the constitution, it is established that there are lacunae in the legal framework which need to be filled through constitutional amendments, enacting a separate IBF Act, Scriptural harmonization of Muslims and Christians on the subject and the resort to ADR. By this way, the success of the rapidly growing IBF system in Nigeria will be enhanced, all fears of a system crash will be allayed and national harmony will be achieved.

The question of whether or not IBF is a constitutional right of the Nigerian 55% Muslims has been cleared to the extent that, it is even the religious right of the Christians, as well,

⁶³⁰Sanusi, L. S. (2011). Op. Cite,

whose religion also prohibit *Riba*, cheating and all harmful products in banking and finance transactions.

In the whole, the panacea to these constitutional lacunae, beside those enumerated above, lies in an international conference in Nigeria, in collaboration with some Malaysian institutions. This would lead to a research for the general amendment of the constitution and other laws relating to IBF in Nigeria to tally with contemporary global socio-economic and political developments.

The constitutional amendments suggested in this research have already been tabled before the Borno State Shari'ah Court of Appeal branch of the National Committee on Nigerian Constitutional Review. This was done through a member of the committee, Dr Alhaji Umar Alkali. It is hoped, with optimism, that the current promising Federal Government of Nigeria, under the able leadership of President Muhammadu Buhari, will accept and forward these suggestions to the National Assembly as an Executive Bill. This is to achieve legally enhanced IBF operations in Nigeria for national prosperity and harmony.

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