AN EVALUATION OF THE OPERATION OF NON-INTEREST BANKING UNDER THE EXISTING LEGAL FRAMEWORK IN NIGERIA

BY

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BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE- LL. M.

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DECLARATION

I hereby declare that this Dissertation titled "***An Evaluation of Operation of Non-Interest Banking Under the Existing Legal Framework in Nigeria***" has been carried out by me in the Department of Commercial Law. The information from other literary publications has been duly acknowledged in the text and a list of references provided. No part of this Dissertation has been previously presented for the award of Master of Laws Degree- LL.M., Diploma or any higher degree at this or other institution.

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CERTIFICATION

This Dissertation titled "***An Evaluation of Operation of Non-Interest Banking Under the Existing Legal Framework in Nigeria***" meets the regulations governing the award of Master of Laws Degree- LL.M. of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

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DEDICATION

This Dissertation is dedicated to my mother, Hajiya Aminatu Sani Bello, for the foundation she led for me, my wife and my entire family for their unflinching commitment to my career development.

ACKNOWLEDGEMENTS

Let me express my profound gratitude to God Almighty for His grace and guidance generally. Indeed, I remain grateful for His help.

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I also thank my colleagues of Legal Services Department of Unity Bank Plc for providing a healthy competition that encouraged me to remain steadfast until now.

TABLE OF STATUTES

1. Arbitration and Conciliation Act, Cap. A18, LFN, 2004 - 99
2. Banks and Other Financial Institutions Act, Cap. B3, LFN, 2004 - 1, 9,10, 20, 27 65, 66,74, 75, 76 78, 84, 85, 93, 94 97, 97, 98
3. Central Bank of Nigeria Act, 2007 - 1, 9, 66, 77, 80, 81 82, 85, 88
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5. Central Bank of Nigeria Guidelines on Shariah Governance for Non-Interest Financial Institutions in Nigeria dated 21st July, 2011 - 1, 2, 24, 25, 27, 30 97
6. Companies and Allied Matters Act, Cap. C20, LFN, 2004 - 1, 10, 20, 22, 23, 34 65, 68, 72, 74, 81 83, 86, 94, 96
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TABLE OF CASES

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3. Bank of the North Ltd v. Bernard [1976]4. CCHCJ 981 - 3
4. First Bank of Nigeria Plc v. Odaudu Uwada (2005) 2, BILR P. 75 - 5
5. Godwin Sunday Ogbaji v. Central Bank of Nigeria and Others, Suit No. FCH/ABJ/CS/710/2011, (unreported) - 1, 76, 92
6. Hausa v. First Bank Plc (2000) F.W.L.R. pt.29 P. 2524 - 4
7. Integrated Dimensions Ltd. v. AIB Ltd. [2002] F.W.L.R. pt. 98 p. 961 - 4
8. Jones & Another vs. Lipman (1962) 1 All E.R. 442 - 68
9. Maina Gambo v Hajja Kyariran, Suit No. JD/39A/1962 (Unreported) - 96
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LIST OF ABBREVIATIONS

All E. R.	– All England Law Reports
ALL F.W.L.R.	– All Federation Weekly Law Reports
BOT	- Build, Operate and Transfer
CAC	- Corporate Affairs Commission
CAMA	- Companies and Allied Matters Act
Cap.	– Chapter
CBN	- Central Bank of Nigeria
CCHCJ	- Certified Copies of High Court of Lagos State Judgments
F.W.L.R.	– Federation Weekly Law Reports
LFN	- Laws of the Federation of Nigeria
L.R.C.N.	– Law Reports of Courts of Nigeria
MEMART	- Memorandum and Articles of Association
N.L.R.	– Nigerian Law Reports
N.M.L.R.	– Nigerian Monthly Law Reports
N.N.L.R.	– Northern Nigeria Law Reports
N.S.C.C.	– Nigerian Supreme Court Cases
N.S.C.Q.R.	– Nigerian Supreme Court Quarterly Law Reports
N.W.L.R.	– Nigerian Weekly Law Reports
SAC	- Shariah Advisory Committee
S.C.	– Supreme Court Cases
S.C.N.J.	– Supreme Court of Nigeria Judgments
S.C.N.L.R.	– Supreme Court of Nigeria Law Reports
W.A.C.A.	– West African Court of Appeal

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ABSTRACT

This Dissertation aimed at evaluating the Operation of Non-Interest Banking Under the Existing Legal Framework in Nigeria. The work has evaluated the regulatory powers of Central Bank of Nigeria in designating products of Islamic Commercial Jurisprudence as banking business in Nigeria. In exercising those powers, the Governor of Central Bank of Nigeria issued Circular on Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria has been analyzed with the products of non-interest banking, which is in line with the Constitutional motive of economic development in Nigeria. In view of this, therefore, the objective of this Dissertation is to identify the working modalities for the smooth operation of non-interest banking in Nigeria as a developing nation. However, the statement of problem of this Dissertation is whether the Governor of Central Bank of Nigeria has power to issue banking licence for non-interest banking and dictate on what Memorandum and Articles of Association of non-interest bank should contain. Also, the operation of non-interest bank is associated with uncertainty as regards to the law applicable to the settlement of dispute between non-interest bank and its customers, while the law governing the transaction is the principles of Islamic Commercial Jurisprudence. In the final analysis, this Dissertation concludes by recommending that Corporate Affairs Commission should design Memorandum and Articles of Association of non-interest bank in order to avoid issuing conflicting regulatory rules that will contravene the existing legislation. While on the other hand, non-interest bank should insert, in all its business documents, a clause in which parties will agree to resolve all disputes through arbitration. The arbitration process should be in accordance with the principles of Islamic Commercial Jurisprudence. In arriving at conclusion here, this work has drawn from a wide range of relevant text materials, statutes, case law, journals and internet materials. It is hoped that the views expressed here would be found useful by all categories of readers including banking sector regulators and bankers; and engender further research in this aspect of law.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

This work sought to carry out "an evaluation of operation of non-interest banking under the existing legal framework in Nigeria." This is in the light of the Guidelines issued by Central Bank of Nigeria (CBN) on banking operation under the Principles of Islamic Commercial Jurisprudence and non-interest window and branch operations of conventional banks and other financial institutions.[1] Further to the release of the Guidelines in 2011, CBN issued a banking license to Jaiz Bank Plc in 2011 to operate under the Principles of Islamic Commercial Jurisprudence, which raised some legal issues relating to the operation of non-interest banking system.

The issues involved the power of CBN under Central Bank of Nigeria Act, 2007 and Banks and Other Financial Institutions Act[2] to issue the license for the operation of Non-interest banking in Nigeria. Some of the issues were raised in the first Nigerian Case on the operation of non-interest bank in Nigeria, *Godwin Sunday Ogbaji v. Central Bank of Nigeria & others.*[3] These also relate to regulatory and supervisory challenges relating to non-interest banking vis-à-vis the provisions of Companies and Allied Matters Act,[4] Investments and Securities Act, 2007 and Nigerian Deposit Insurance Corporation Act, 2006.[5]

[1] CBN Guidelines on Shariah Governance For Non-Interest Financial Institutions In Nigeria, dated 31st December, 2010
[2] Cap. B3, Laws of the Federation of Nigeria, 2004
[3] Suit No. FCH/ABJ/CS/710/2011, (unreported).
[4] Cap. C20, Laws of the Federation of Nigeria, 2004.
[5] Non-Interest Bank is subject to the supervision of Nigerian Deposit Insurance Corporation.

Prior to CBN guidelines on Non-Interest Financial Institutions,[6] banks in Nigeria were based on interest. *Black's Law Dictionary, Eight Edition*[7] defines interest as 'Payment a borrower pays a lender for the use of the money'. It is different from usury and this distinction was introduced with the passage of Usury Law in 1545 by the British Parliament. A difference between "*interest"* and *"usury"* is that the later means "charging illegal high interest".

Interest, according to **Encyclopedia Britannica**, 'became legalized from the 13th Century with expansion of trade. Demand for credits increased necessitating a modification of the definition of the term "usury". In 1545, England fixed a legal maximum interest; any amount in excess of the maximum was usury'.

Microsoft Encarta Encyclopedia also supports the above in the following words: "Usury, in law is a payment of interest by a borrower to a lender for the use of money, in excess of the amount fixed by statute."

Interest, in other words, now stands for any charge paid by a borrower for the use of money within the limit allowed by CBN.

In essence, interest could take either one or two forms of interest – simple or compound. Simple interest is interest computed on the principal and principal alone. Compound interest, on the other hand, is capitalization of interest so that interest itself yields interest. In short, it is interest on both principal and accrued interest. The two forms of interest apply to both loan and overdraft. The case of *NIDB v. Olalomi Ind. Ltd.*[8] illustrates what is compound interest.

[6] CBN Guidelines, Op. Cit.
[7] Garner., B.A. (1990), Black's Law Dictionary 3rd Edition West Publishing Company, London.
[8] (2002) F.W.L.R. (pt. 98) p.961

The Respondent in that case borrowed total sum of N1.7million from the Appellant as term loan and working capital on 31st December, 1983. Along the line, problem arose between the parties, which led to the Respondent suing the Appellant, claiming damages before the court of first instance. The Appellant then as Defendant counter-claimed inter-alia for total sum of N290,931,823.08 being the total sum outstanding against the Plaintiff as at 31/3/1996. The Court of Appeal in its considered judgment awarded the claim of the Appellant in spite of the amounts paid by the respondents towards liquidating the debt.

Conventionally, charging interest is legalized depending on the discipline of advocate. Moralists (philosophers concerned with the principles of morality) on the other hand, questioned why interest should be charged with equally very weighty arguments. Therefore, from time immemorial, disputes between banks and their customers revolve around legitimacy to charge interest, at what rate, that is simple or compound and whether the rate could be varied by a bank without the customer's consent. Disputes also often arise where terms have not been agreed upon between the parties. This is so because an overdraft could result with or without any formality as decided in the cases of *Bank of the North Ltd v. Bernard*[9] and *National Bank Ltd v. Olatunji*[10].

Generally, a banker is entitled to charge interest simple or compound based on an agreement, custom or acquiescence by customer. In the case of *Union Bank of Nigeria Plc v. Sax Nig. Ltd.*[11] the Court of Appeal held that a banker has the right to charge interest on all overdrafts and that when considering whether interest is payable on overdrafts, Nigerian Courts must

[9] [1976]4. CCHCJ 981
[10] [1974]12. CCHCJ 179
[11] (1991) 7 N.W.L.R. (pt 202) 227

have regards to the custom of bankers in Nigeria. Also the Court of A ppeal in the case of *Suberu v. Cooperative Bank Ltd.*[12] held as follows: "A bank is empowered to charge interest on loans or overdraft on the basis that there is a custom to that effect , or that the customer has impliedly consented where, without protest, he allows his account to be debited."

The position has crystallized such that the Court observed that: "A bank has power to charge compound interest on loans or other advances granted to a customer **even where there was no express agreement on the rate of interest to be charged.** This is because the customer is taken to impliedly consent to an interest to be charged to his account." [13]

Unilateral variation of interest rate as pointed out is one area bank debtors always anchor their cases on. Economists and judges are indeed concerned about this phenomenon. Adekeye JCA could not hide his feelings and observed as follows:

> Variation of interest rate called for my brief comment. The practice of banks charging a varying interest rates…should be revisited in the interest of the nation's economy and public interest. A lot of otherwise viable business concerns had fallen victims of such arbitrary practice of the banks and have been prematurely paralyzed or flushed out of business.[14]

However, this issue has since been laid to rest by the Supreme Court in the case of *Union Bank of Nigeria Plc v. Albert Ozigi*[15] where **Adio, JSC** held that: "'It was therefore wrong to import matters such as the requirement that the Appellant must obtain the prior consent of or given prior notice of increase in the rate of interest on the loan to the respondent." Nowadays,

[12] (2004) ALL F.W.L.R. (pt. 236) p. 31
[13] **Hausa v First Bank Plc (2000) F.W.L.R. pt. 29 p. 2524. and** Union Bank of Nigeria Plc v Ifeoluwa (2007)7 N.W.L.R. pt. 1032.
[14] Integrated Dimensions Ltd v. AIB Ltd. [2002] F.W.L.R. pt. 98 p. 961
[15] (1994) 15 L.R.C.N. 257 (SC)

banks always ensure that charging of interest is expressly provided in the contract of loan or the security documentation in realization of the advantages of express terms over implied terms.

Notwithstanding the above, it should be borne in mind that essential of interest simple or compound is in conformity with Central Bank Monetary Guidelines. On this point, the Court of Appeal in *First Bank Plc v Odaudu Uwada*[16] as follows: "Banks to charge rate of interest on advances, loans credit facilities…must be in line with the stated minimum and maximum rates of interest which were approved."

Further, it was held: "It is a matter of common knowledge which this Court is entitled to judicial notice that the rates approved in the CBN guidelines vary from time to time."[17]

No doubt, people would undoubtedly want to transact banking business with non-interest bank in order to avoid severe implications of interest rate chargeable on loans given to them by banks. However, how legally are their deposits protected? Sufficient legislation and legal framework are certainly required to avoid economic challenges.

With regard to the introduction of non-interest banking in Nigeria, this work focused on the operation of non-interest banking and its legal framework in Nigeria and it did not dwell much on religious perspective. However, to succinctly give more light on what is meant by non-interest banking, this work would consider some few areas where the interest chargeable by banks on loans are considered as unjust under the Shariah.

[16] (2005) 2, BILR p. 75
[17] Ibid.

When the Shariah texts concerning interest are read, the stringent warnings against any involvement in interest will certainly be perceived. Islam prohibits a number of immoral acts such as fornication, adultery, homosexuality, consuming intoxicant and murder. However, the variety of discussion and extent of warnings for these acts are not of the same degree with those related to taking interest. This has led Sayyid Qutb to write: "No other issue has been condemned and denounced so strongly in the Quran as usury."[18]

The Quran, for example, contains the following verses concerning interest: "O you who have believed, do not consume interest, doubled and multiplied, but fear God that you may be successful. And fear the Fire, which has been prepared for the disbelievers."[19] This strong warning towards the believers warns of a fatal consequence: being thrown into the Hell-fire that has been prepared for the disbelievers.

God Almighty also says in Quran 2:275-276:

> Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, Trade is [just] like interest.' But God has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with God. But whoever returns [to dealing in interest or usury] those are the companions of the Fire; they will abide eternally therein. God destroys interest and gives increase for charities. And God does not like every sinning disbeliever.[20]

These verses have many interesting points. Commenting on the first portion of the verses, Maudoodi has written, thus:

[18] Qutb. S. (1999), *In the Shade of the Quran,* Markfield, Leicester, United Kingdom, vol. 1, p. 355.
[19] Quran 3:130-131
[20] Abdul-Fattah, M.M. (2004), *Al-Fiqhul-Muyassaru Minal-Qur'an was-Sunna,* Dar Al-Manarah, El-Mansoura, Egypt, vol. 2, p. 1042

> Just as an insane person, unconstrained by ordinary reason, resorts to all kinds of immoderate acts, so does one who takes interest. He pursues his craze for money as if he is insane. He is heedless of the fact that interest cuts the very roots of human love, brotherhood and fellow-feeling, and undermines the welfare and happiness of human society, and that his enrichment is at the expense of the well-being of many other human beings. This is the state of his "insanity" in this world: since a man will rise resurrected as a lunatic.[21]

Secondly, the verses make it quite clear that there is a difference between legitimate business transactions and interest. The difference between them is so glaring that the verses do not bother to explain them, which is one of the stylistic aspects of the Quran. Thirdly, these verses clearly state that God "destroys interest and gives increase for charities." This is one of God's "laws" which humankind cannot necessarily discover on its own. The ultimate and full negative effects of interest on the individual, community and world as a whole in both this life and the Hereafter are known only to God. However, a glimpse of some of those negative effects, testifying to the truth of these verses has been witnessed during the recent economic recession.

Shortly after the above verses, Allah further says in Quran 2:278-279:

> O you who believe, fear God and give up what remains [due to you] of interest, if you should be believers. And if you do not, then be informed of a war [against you] from God and His Messenger. But if you repent, you may

[21] Mawdudi, A.A. (1988), *Towards Understanding the Quran*, Markfeild, Leicester, United Kingdom, vol. 1, p. 213.

have your principal [thus] you do no wrong [to others], nor are you wronged.[22]

Who in his right sense would expose himself to a declaration of war from God and His Messenger? Undoubtedly, a stronger threat one will rarely find. At the end of the verse, God makes it very clear why interest is forbidden: it is wrongdoing. The Arabic word for such is *Zulm*, meaning a person has done wrong to, harmed or oppressed another person or his own soul. This verse demonstrates that interest is not forbidden simply due to some ruling of God without any rationale behind that ruling. Interest is definitely harmful and, therefore, it has been forbidden.

In addition to the verses of the Quran, the Prophet Muhammad (peace and blessings of God be upon him) also made many statements concerning interest. For example, the following statement clearly demonstrates the gravity of this action as narrated by Al-Bukari and Mulim: "Avoid the seven destructive sins: associating partners with God, sorcery, killing a soul which God has forbidden- except through due course of the law, devouring interest, devouring the wealth of orphans, fleeing when the armies meet, and slandering chaste, believing, innocent women."[23]

In fact, another statement of the Prophet (peace and blessings of Allah be upon him) should be sufficient to keep any God-fearing individual completely away from interest. The Prophet (peace and blessings of Allah be upon him) said: "One coin of interest that is knowingly consumed by a person is worse in God's sight than thirty-six acts of illegal sexual intercourse."[24]

[22] Abdul-Fattah, M.M., Op. Cit., vol. 2, p. 1042.
[23] Abdul-Fattah, M.M., Op. Cit., vol. 2, p. 1043.
[24] Bambale, Y.Y. (2007), *Islamic Law of Commercial and Industrial Transactions,* Malthouse Press Limited, Lagos, p. 146.

In another Hadith narrated by Ahmad and others, the Messenger of Allah (peace and blessings of God be upon him) said, "Allah cursed the one who takes interest, the one who pays interest, the two persons who witnesses the deed [that is, the interest contracts] and the one who writes the contract."[25]

This is a basic principle in Islam. If something is forbidden and wrong, a Muslim should not participate in it or support it in any way. Thus, since interest is forbidden, it is also forbidden to be a witness to such contracts, to record them and so on. The Prophet's words also explain that there is no difference between the one who pays interest and the one who receives it. This is because they are both involved in a despicable practice and, hence, they are equally culpable.

The Prophet Muhammad (peace and blessings of Allah be upon him) also said: "If illicit sexual relations and interest openly appear in a town, they have opened themselves to the punishment of God."[26]

1.2 Statement of Problem

Central Bank of Nigeria is conferred with powers to regulate banking sector in Nigeria as enshrined under Sections 57 and 61 of Banks and Other Financial Institutions Act,[27] and Section 33(1) of Central Bank of Nigeria Act, 2007. However, such powers are to be exercised within the confined provisions of the Acts.[28] The Bank could not make rules or regulations without taking into cognizance of the relevant legislations that affect the area of

[25] Abdul-Fattah, M.M., Op. Cit., vol. 2, p. 1043.
[26] Bambale. Y.Y. (2007), Op. Cit., p. 147.
[27] Cap. B3, Laws of the Federation of Nigeria, Op. Cit.
[28] Ibid.

the new regulations. Therefore, it could not make regulations, pursuant to its powers, that would contradict the provisions of existing legislations. Such legislations include:

(a) Companies and Allied Matters Act-[29] Any financial institution in Nigeria must be registered with Corporate Affairs Commission (CAC). With the issuance of banking license to operate under principle of Islamic Commercial jurisprudence in Nigeria, Memorandum and Articles of Association (MEMART) is required to state that the banking operations will be conducted in accordance with the Shariah principles and practices. However, under Islamic Commercial Jurisprudence, the legal personality of a company is arguable. In this circumstance, banking operations under the Principle of Islamic Commercial Jurisprudence and, at the same time, under CAMA[30] needs systematic legal framework.

(b) Banks and Other Financial Institutions Act-[31] Any bank or financial institution that seeks to operate in Nigeria must comply with the provisions of this Act. The law does not permit banks to engage directly in business enterprises by using depositors' funds. However, this is the basic asset acquiring method of non-interest bank. Therefore, to allow banking business under the Shariah Law, the business must fall under section 66, which provides as follows: *"banking business* means the business of receiving deposit on current account, savings account or similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance or such other business as the Governor may, by order published in the Federal Gazette, designate as banking business."

In the light of the above legislation, is the operation of non-interest banking under the principles of Islamic Commercial Jurisprudence in line with the existing legislations on banking business?

[29] Cap C20, Laws of the Federation of Nigeria, Op. cit,
[30] Ibid.
[31] Cap. B3, Laws of the Federation of Nigeria, Op. Cit.

(c) Nigerian Deposit Insurance Corporation Act, 2006- The Act established Nigerian Deposit Insurance Corporation (NDIC), which is responsible for insuring all deposit liabilities of licensed banks[32]. Similarly, the introduction of non-interest banking in Nigeria has necessitated the extension of Deposit Insurance coverage to the depositors of such bank in order to provide a level playing field for all deposit-taking financial institutions and ensure that holders of non-interest banking products are adequately protected. NDIC is empowered to make rules and regulations and make different provisions for different circumstances guiding the operations of the Deposit Insurance Scheme.[33] Therefore, how relevant the NDIC rules will be to the products of the Shariah Principles?

(d) Investments and Securities Act, 2007: The current non-interest bank operating in Nigeria, Jaiz Bank Plc, has the following features:

(i) it operates as a public company;

(ii) it sells its shares by inviting public to subscribe to its shares, and

(iii) it issues share certificates to its shareholders.

The above features render non-interest bank to be regulated by Security and Exchange Commission (SEC) in accordance with the provisions of Investments and Securities Act, 2007. SEC is empowered to regulate all offers of securities by public companies and entities and to register securities of public companies.[34] Similarly, pursuant Rule 40 of SEC Rules and Regulations, the investment of non-interest bank must be registered with SEC. In this light, is shareholders' investment, which would be operated under *Musharakah* and *Mudarabah* subject to SEC rules and regulations other than the principles of Islamic

[32] Section 2(1)(b), Nigerian Deposit Insurance Corporation Act, 2006.
[33] Sections 7(1)(e) and 56, Ibid.
[34] Section 13(c) and (d), Investments and Securities Act, 2007.

Commercial Jurisprudence? So, a nexus between non-interest banking, the legislation and auxiliary legislation must be provided in order to aid in resolving issues that may come up under the investment.

1.3 Objective of the Study

The main objective of this work is to identify the working modalities of non-interest bank vis-à-vis its legal regime with a view to drawing the attention of the relevant Regulatory Authorities and National Assembly on the need to bridge the gaps that exist in the current legislation relating to operations of non-interest bank(s) in Nigeria. The work would enable the Regulators understand how investments in non-interest bank could be supervised and regulated without contravening the existing laws.

It would also assist in determining matters relating to the operations of non-interest banking in a situation of disputes with customers. The findings of this work would undoubtedly guide on how the shareholders' funds and depositors' money would be legally safeguarded without legal tussle and confusion.

Another important aspect of this study is that it would pave a way for incorporating other financial services legally in the segment of Nigerian economy, which would certainly help in boosting our economy and equitable distribution of wealth among society. It would also show how conventional banking practice and non-interest banking could be operated in Nigeria with sufficient rules and regulations that may harness all economic sectors.

1.4 Significance of the Study

This work was prepared to light up the way for students of Law, Banking, Legal Practitioners, banking and investment Regulatory Authorities, and members of public who may transact business with or wish to incorporate non-interest bank in Nigeria.

1.5 Scope of the Research

The research evaluated how non-interest banking will be adopted into Nigerian legal system and its role in financial and economic sectors. The work has concentrated particularly on the recent CBN Circular and Guidelines for the operation of non-interest banking under the principles of Islamic Commercial Jurisprudence in Nigeria with particular reference to the existing relevant Legislations, rules and guidelines.

1.6 Research Methodology

The research has drawn on a two-tiered methodological approach; the Empirical and Doctrinal approaches. Accordingly, primary research materials have been analyzed; Statutory authorities relating to banking business in Nigeria have been analyzed. Secondary research materials such as books and journals containing articles by academic writers have been relied upon for the relevant literature they supplied.

The Empirical method has been employed by conducting interviews relating to the operations of Jaiz Bank Plc in order to find out the level of satisfaction or dissatisfaction with the current circumstance of non-interest banking in Nigeria. This has been established in the findings of this work.

1.7 Literature Review

In order to achieve the objective of this research, numerous literatures were reviewed. Notable amongst them are standard book materials on non-interest banking and Islamic Commercial and Industrial transactions, Law Reports, Newspapers, Magazines, Seminar/Workshop papers and Policy Statement made by constituted authorities.

In the course of this work, a lot of literatures have been used. Most of which, however, cover either one or two aspects of this research, i.e. operation of non-interest banking under the principles of Islamic Commercial Jurisprudence or operation of conventional banking in Nigeria, thus creating a gap which this research aimed to fill in same. Some of the literatures review at present are:

Nigerian Investment Laws and Business Regulations by Akintola Jimoh & Co.[35] The author analyzed licensing and regulation of Banks and Other Financial Institutions in Nigeria with special focus on their role under conventional banking system. The author described how CBN Governor could issue a banking license without mentioning the statutory power of the Governor of CBN to make rules and regulations relating the institutions under the CBN supervision. Similarly, the author also did not discuss on issuance of the Guidelines by CBN and the operation of profit and loss sharing banking, which is one of the permissible banking businesses under Nigerian Law. This has been addressed out in Chapter Five of this work.

Al-Muwatta Ibn Malik, Translated by Rizq Waheed Siddiqi , Dar- Almanarah, Egypt (2011) – Discussion on non-interest banking operations under the principles of Islamic Commercial Jurisprudence could not be complete without making reference to this giant book. This book is found very useful for the application of *Mudarabah* and *Musharakah* by non-interest bank.

Al-Fiqhul-Muyassaru Minal-Qur'an was-Sunna, Translated by Muhammad M. Abdul-Fatah (2004), Dar Al-Manarah, El-Mansoura, Egypt- This has been immensely used particularly in quoting Qur'anic verses and Statements of Prophet (p.u.h.) concerning

[35]Akinnola, J. (2002), *Nigerian Investment Laws and Business Regulations*, Publishments Limited, Lagos.

interest. However, it is observed that the author of the book did not quote some Qur'anic verses that warned against taking interest.

Interest-Free Banking by Ahmad Bello,[36] the book identifies the nature and characteristics of the interest and its societal and economic effect. The book also approached the religious perspectives on interest but did not delve or discuss how interest free banking would be practiced particularly in Nigeria.

Non-Interest Banking, How Far Have We Gone,[37] the author has analyzed the operational procedures, mechanisms and functions of non-interest banking. He stated that it's one of the functions of non-interest bank to provide an institutional framework for converting the charitable funds into socially productive use intended for the benefit of the common people. The theory of the author has failed to consider the business goal for making profit, which is acceptable, and distinguish between charitable funds with business venture in non-interest banking. Similarly, since the author discussed the features of non-interest banking, it behooves on him to discuss the legal framework, also, towards safeguarding the interest of the depositors as well as the shareholders. Chapter Six of this work has made recommendation on how legal framework would be done to adequately safeguard the depositors' funds in non-interest bank.

Introduction to Islamic Economics and Banking System,[38] the author dwelt in practical operation of non-interest banking without considering legal framework of same in Nigeria. It is undoubtedly imperative that the concept of Non-interest banking cannot be put in practice

[36] Bello, A. (2006), *Interest-Free Banking,* Yaliam Press No. 6, Borno Street, Area 10, Garki, Abuja.
[37] Paramanik, A. (2009*), Non-interest banking, How Far Have We Gone, I*IUM Press, International Islamic University, Malaysia.
[38] Saleh, A. (2003), *Introduction to Islamic Economics and Banking System*, Gidan Dabino Publishers, Kano.

without adequate legal framework with a view to protecting the Shareholders and the depositors as well.

Islamic Law of Commercial and Industrial Transactions[39]- This book has talked of the adverse effect of interest to our economy, therefore the work would undoubtedly use the book in order to bring out the economic and social disaster caused as a result of giving loans with interest by conventional banks in Nigeria. Furthermore, non-interest bank raises its initial capital or equity in a simple and straight forward way based on the Islamic equity contract of *Musharakah* among its first shareholders**.** The author of the book has extensively dwelt on *Musharakah* contract, which I indispensably found useful to this work. Similarly, non-interest bank offers to the public investment account based on the concept of *Mudarabah* contract. That is the client receives a return on his investment as well as facing the risk of failure. The author of the book has richly shown how *Mudarabah* contract is executed under the Shariah. Therefore, this work will definitely use the work of the author in order to give detail on the operations of non-interest banking in Nigeria.

A Brief Sense on Islamic Business Practices[40]- Non-interest bank must satisfy some features that render it different from conventional banking system. The author of the book has talked on some of these features, which this work will make reference to and found same relevant to this work. However, it did not state how working modalities of non-interest bank operate, which this work discussed in Chapter Three.

Money and Banking in Islam[41]-It is part of the objectives of non-interest bank to promote, foster and develop the application of Shariah principles, law and tradition to the transaction

[39] Bambale, Y.Y. (2007), *Islamic Law of Commercial and Industrial Transactions*, Malthouse Press Limited, Lagos. .
[40] Zowk, O. (2011), *A Brief Sense On Islamic Business Practices*, Dar-Al-Quran, Lebanon.
[41] Ahmed, Z., *et al* (1983), *Money and Banking in Islam*, Institute of Policies Studies, Islamabad, Pakistan.

of financial, banking and related business affairs and to promote investment companies, enterprises and concerns which would be engaged in business activities as are acceptable and consistent with the Shariah principles, laws and traditions. Non-interest bank in Nigeria is allowed to engage itself in issuing Bonds and Securities in accordance with the Shariah. This book would be used in this work, especially on issues related to Bonds and Securities that are being issued by non-interest bank in Nigeria.

Transactions in Islamic Law-[42]- In non-interest banking dealings, there exists contractual relationship between the Shareholders, employees as well as the customers that deposit their money into various accounts with the Bank. The relationship between all the stakeholders is contractual under Islamic Commercial Jurisprudence. However, this book did not address a conflict situation, which this work discussed in Chapter Six in Nigerian context.

Banking Without Interest[43]- Unlike conventional banks in Nigeria, non-interest bank is only bank in Nigeria that is allowed to extend loans to its client without interest. This is one of the features of non-interest bank to grant facilities to the members of the society with a view to eliminating poverty and providing equal opportunity to all in wealth acquisition. The Author of this book has talked on how non-interest bank could accommodate its clients with different bank loans for the purpose of meeting their personal needs, expanding their business activities and creation of job opportunities to all by financing the business of commercial industries. However, the Author did not state how the Bank would safeguard the money lent to ensure repayment by the borrowers. This has been addressed in Chapter Three of this work.

[42] Kharofa, A. (2004), *Transaction in Islamic Law*, A.S. Noordeen, Kuala Lumpur.
[43] Siddiqi, M.N. (1983), *Banking Without Interest,* The Islamic Foundation, Leicester, United Kingdom.

Banking & Islamic Law[44]- Being a partner in business and industry, non-interest bank supervises the progress of work under the vigilance of its Staff. Similarly, Non-interest bank is under supervision of CBN as a Regulatory and Supervisory Body in Nigeria. The author of this book has talked on how fiscal policies are made under the Shariah principles in such a way that non-interest bank could participate in Treasury Bill of CBN, international transactions and Stock Exchange securities that involves transfer of money to foreign countries. This book would be used in this work in these aspects.

Islamic Banking and Uncertainty[45]- Non-interest bank is not only prohibited in illicit business transactions as forbidden by the Shariah, but also in some business transactions that involve uncertainty. The author of this book has talked of businesses and highlighted areas where uncertainty renders the transaction void in the eyes of the Shariah. This work finds the author's book useful especially in areas where Non-interest bank finances in day-to-day business activities.

The Historic Judgment On Interest Delivered in the Supreme Court of Pakistan-[46] The judgment delivered by Justice (Rtd.) Mufti Muhammad Taqi Usmani as published is found to be useful to this work particularly on the types of *Riba* right from Jahiliyya period.

A lot of books, journals and papers will be considered in the course of this work.

[44] Muslehuddin M. (2008), *Banking & Islamic Law,* Pataudi House, Darya Ganj, New Delhi, India.
[45] Samadani, M.E.A. (2007), *Islamic Banking and Uncertainty,* Darul-Ishaat, Karachi.
[46] Usmani, M.T. (2010), *The Historic Judgment On Interest Delivered in the Supreme Court of Pakistan,* Maktaba Ma'ariful Qur'an, Karachi.

1.8 Organizational Layout

Chapter One contained general introduction to the study, background to the study, statement of problems, objectives of the study, its significance, scope, as well as the research methodology.

Chapter Two dealt with the services being rendered to customers by non-interest bank. This includes types of accounts that operate under non-interest banking system in Nigeria and businesses that are financed by non-interest bank as approved by CBN in line with the Shariah principles and practice.

Chapter Three evaluated the Islamic legal regime and conventional legal regime of non-interest banking in Nigeria. It also examined the power of Central Bank of Nigeria to issue banking licence for the operation of non-interest banking under the Principles of Islamic Commercial Jurisprudence in Nigeria.

Chapter Four dwelt on the power of CBN Governor to regulate the activities of non-interest bank in Nigeria. It highlighted some areas where the Governor of CBN exceeding his statutory power while making rules and regulation for the operation of non-interest bank. As a result, he encroached into the supervisory and regulatory power of another regulatory authority.

Chapter Five summarized the study after which conclusion is drawn based on analysis and discussions in the preceding Chapters. It also proffered recommendations that are aimed at bridging the gaps that exist in the framework of non-interest banking in Nigeria in order to legally safeguard both depositors and shareholders of non-interest bank.

CHAPTER TWO

ESTABLISHMENT AND OPERATION OF NON-INTEREST BANK IN NIGERIA

2.1 Introduction

It is well known fact that owners of savings might not have the temperament, ability, time and opportunity to invest their savings in productive enterprises, whereas the Shariah has strong condemnation for hoarding of savings and appreciation for productive use of money. It is a bank that mobilizes idle savings and makes them available for productive uses. Thus, the bank does an important function by facilitating the objectives of the Shariah.[47]

In addition to that, the objective of the non-interest bank is to promote, foster and develop the application of the Shariah principles, law and tradition to the transaction of financial, banking and related business affairs and to promote investment companies, enterprises and concerns, which shall be engaged in business activities as are acceptable and consistent with the Shariah principles, law and tradition.

To venture and participate in the growth of a steady economy and give equal opportunity to all, non-interest bank will first of all get recognition in the eyes of the Nigerian relevant laws, which include Companies and Allied Matters Act (CAMA)[48], Investments and Securities Act, 2007 (as amended) and Banks and Other Financial Institutions Act[49].

2.2 Establishment of a Body Corporate in Compliance with the Shariah

Before approaching relevant Regulatory Bodies for registration and license, non-interest bank could be established on the principles of *Sharikatul-Inan,* which connotes a number of persons providing share capital to be jointly invested, who are referred to as "*Shareholders".*

Sharikatul-Inan also means limited partnership, whereby each partner has the right to dispose of his share and to be commissioned by the other partner.[50] The origin of the word "*inan"* is from Arabic root "*anna"* means "*occurred".* Thus, the name "*inan"* means each one of the partners acts according to what occurs to him best in the transaction. In the same vein, it may mean the "*ínan"* (rein) of a horse. In this case, the name of the company means that the partner has the freedom of activity in disposing of affairs in the partnership.[51]

[47] Pramanik, A. H. (2009), *Islamic Banking, How Far Have We Gone,* IIUM Press, International Islamic University, p. 51
[48] Cap C20, Laws of the Federation of Nigeria, 2004.
[49] Cap. B3, Laws of the Federation of Nigeria, 2004.
[50] Bambale, Y.Y. (2007), *Islamic Law of Commercial and Industrial Transactions*, Malthouse Press Limited, Lagos, p. 172
[51] Kharofa, A. (2004), *Transactions In Islamic Law,* A.S. Noordeen, Kuala Lumpur, pp. 173-174

According to Islamic Commercial Jurisprudence, all partners must first have legal capacity to enter into a binding contract under the Shariah. This legal capacity is divided into two, viz;

(a) Capacity for acquisition of rights (*Ahliyyat al-wujub*) and,

(b) Capacity for execution of rights and duties (*Ahliyyat al-Ada)*[52].

Ahliyyat al-wujub is the ability of a human being to acquire rights and obligations, or the eligibility of a person to acquire rights for and upon himself, or the status which makes a person eligible to obtain rights for or upon himself. This type of capacity is being possessed by every human being in all stages of his life from the time he was born to the date of his demise. This is irrespective of the fact that he or her has reached the age of puberty and possessed the intellect (*aql*) and rationality (*rushd*). The basis for the existence of this capacity here is the attribute of being a human being.[53] Therefore, this capacity is applicable to all human beings generally, including a child in the womb of its mother (though incomplete) unless and until it is delivered lifeless. If it is delivered lifeless, then it ceases to possess such capacity.

Ahliyyat al-Ada on the other hand is the capacity of a human being to issue statements and perform acts and deeds which the Lawgiver has assigned legal effects. The basis for the existence of this capacity here is the attribute of being in possession of the intellect (*aql*) and rationality (*rushd*).[54]

The emphasis here is that once the individual possessed capacity for criminal liability, capacity to enter into a binding transaction and capacity for the acts of worship, then he attained *Ahliyat al-ada*. In this regard, once the individual becomes adult, he may enter into the limited partnership with other individuals for the purpose of business transaction.

The amount of capital provided by each shareholder may be equal or may vary. Ideally, the share value might be fixed at N1.0 per share with each shareholder being allowed to secure as many shares as he wishes. The minimum and maximum limits of the subscribed capital may also be specified in line with the requirements of the Central Bank of Nigeria (CBN). Ultimately, each shareholder would become the owner of the bank, proportionately with the level of his assets in the total investment.[55] This is in line with Section 79 (1) of CAMA,[56] as regards to membership of the company, which provides as follows: "The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members."

In the light of the above provision, any person that agreed and duly executed a partnership agreement for the incorporation of the non-interest bank is deemed to be a member of the

[52] Bambale, Y.Y., Op. Cit., p. 23.
[53] Ibid.
[54] Ibid.
[55] Siddiqi, M.N. (1983), *Banking Without Interest,* The Islamic Foundation, Leicester, United Kingdom, p.15
[56] Cap. C20, Laws of the Federation of Nigeria, 2004, Op. Cit.

company and also by subscribing to the memorandum that would be filed with Corporate Affairs Commission (CAC).

Furthermore, a distinct nature non-interest bank will have from that of conventional banks is that the liability of a partner should be unlimited to the extent of his share-capital, but should, in principle, be unlimited. Thus, if the bank suffers losses such that its capital is insufficient to pay its liabilities, the deficiency must be met by the partners from their personal assets.[57]

For the purpose of obtaining licence from CBN for operations of non-interest bank as full pledged non-interest deposit money bank or subsidiary or full-fledged non-interest microfinance bank or subsidiary, it is part of the requirements that the promoters' application shall be accompanied by evidence of a technical agreement executed by the promoters of the bank with an established and reputable non-interest bank or financial institution. The agreement shall explicitly specify the role of the two parties and shall subsist for a period of not less than 3 years from the date of commencement of operations.[58] By entering into the partnership, the partners should commence the process of registration of the company by engaging a legal practitioner to incorporate non-interest bank in accordance with the provisions of CAMA.[59] The Memorandum and Articles of non-interest bank should state that its business operations will be conducted in accordance with Shariah principles and practices. This is mandatory for any non-interest bank in Nigeria before obtaining licence from CBN.[60]

2.2.1 Establishment of Shariah Advisory Council (SAC)

Prior to the commencement of operations of non-interest bank, the bank shall establish a 'Shariah Advisory Body' as part of its governance structure to be known as "Shariah Advisory Committee." The SAC shall operate as an independent body, within the organization, with the principles of competence, confidentiality and consistency properly enshrined in its operations.[61]

The Board of Directors of non-interest bank shall appoint members of the SAC subject to the approval of CBN. The appointment shall be for a renewable term of four years subject to a maximum of three terms.[62]

2.2.2. Qualification for SAC Member

[57] Siddiqi, M.N., Ibid., p. 18.
[58] CBN Circular No. FPR/DIR/CIR/GEN/01/010, dated 13th January, 2011.
[59] Section 35(3) of Companies and Allied Matters Act, *Op. Cit.,* provides that the incorporation of banking and insurance companies is exclusively vested in legal practitioners. Therefore, the partners should engage the services of legal practitioner for the incorporation of non-interest bank.
[60] CBN Circular, Op. Cit.
[61] Ibid.
[62] CBN Guidelines on Shariah Governance for Non-Interest Financial Institutions in Nigeria, released on 31st December, 2010.

Member of SAC must fulfill some requirements that are prescribed by CBN to enable him/her qualify to be a member. They are as follows:

(i) A member of the SAC shall be an individual and not a company, institution or body;

(ii) The proposed member of the SAC shall, at a minimum, have an academic qualification or possess necessary knowledge, expertise or experience in the sciences of the Shariah with particular specialization in the field of Islamic Transactions/Commercial Jurisprudence (Fiqh al Mua'amalat), and

(iii) It is highly desirable for the member to have:

(a) skills in the principles of Islamic Law (Usul al Fiqh),

(b) good knowledge of written Arabic,

(c) ability to speak in both Arabic and English, and

(d) exposure in the areas of business or finance especially Islamic Finance.[63]

2.2.3 Composition of SAC

The composition of SAS is as follows:

(i) It shall consist of a minimum of three (3) members.

(ii) It may engage the services of consultants who have expertise in the field of business, economics, law, accounting or any other field that will assist it in making informed judgment on the Shariah compliance of banking and financial products and services. Such consultants may attend meetings of the SAC but shall not take part or exercise voting rights in giving a Shariah legal opinion or verdict by the SAC.[64]

2.2.4 Restrictions on the SAC Membership

There are restrictions placed on the members of the SAC of Non-Interest Financial Institution. The restrictions are as follows:

(a) No individual member of the SAC shall belong to more than one SAC of financial institutions belonging to the same category. The emphasis here is that a member of the SAC of full pledged non-interest money deposit bank or subsidiary shall not be a member of the SAC of another full pledged non-interest money deposit bank or subsidiary.

[63] Ibid.
[64] Ibid.

(b) A member of CBN Shariah Advisory Council shall not be a member of a Shariah Advisory Committee in a bank or financial institution under the regulatory purview of CBN.

(c) A member of the SAC shall not be a member of the Board of Directors of the institution he/she renders his/her advisory services.

(d) No member of the SAC of the Non-Interest Financial Institution shall be a director or executive management staff, or significant shareholder of the Non-Interest Financial Institution.[65]

2.2.5 Duties and Responsibilities of the SAC

The SAC of the Non-Interest Financial Institution is saddled with some duties and responsibilities independent of that of the members, management and employees of the organization. The aim is to ensure full compliance with the Principles of the Shariah in the course of rendering its financial services to its customers, without indulging into the activities that are not acceptable by the Shariah. It shall be the duty and responsibility of the SAC to:

(i) be responsible and accountable for all the Shariah decisions, opinions and views provided by them.

(ii) advise the Non-Interest Financial Institution's board and management on the Shariah matters so as to ensure the institution's compliance with the Shariah principles at all times.

(iii) review and endorse the Shariah related policies and guidelines for the business of the organization. This shall include a periodic review of products and services to ensure that

[65] Ibid.

operational activities and transactions of the institution are made in accordance with the principles of the Shariah.

(iv) endorse and validate relevant documents for new products and services to ensure that they comply with the Shariah. These also include:

(a) terms and conditions contained in forms, contracts, agreements or other legal documentation used in executing the transactions; and

(b) the product manual, marketing materials, sales illustrations and brochures used to describe the product or service.

(v) ensure that the necessary ex-post considerations are observed after the product offering stage, namely the internal Shariah review processes and the Shariah compliance reporting. This is in order to monitor the Non-Interest Financial Institution's consistency in the Shariah compliance and effectively manage the Shariah compliance risk that may arise over time.

(vi) assist or advise related parties to the Non-Interest Financial Institution, such as its legal counsel, auditors or other consultants on the Shariah matters upon request.

(vii) provide written Shariah opinion to the Non-Interest Financial Institution in respect of new products and other issues referred to it.

(viii) provide support to the Non-Interest Financial Institution in respect of questions or queries that may be raised regarding the Shariah compliance of its products.

(ix) issue recommendations on how the Non-Interest Financial Institution could best fulfill its social role as well as promoting non-interest banking and finance.

(x) provide checks and balances to ensure compliance with the Shariah principles.

(xi) assist the internal audit of the Non-Interest Financial Institution on the Shariah compliance audit and,

(xii) carry out any other duties assigned to it by the board of the Non-Interest Financial Institution.[66]

From the date of releasing the Guidelines by CBN, a copy of the proposal for the establishment and composition of the SAC of any Non-Interest Financial Institution in Nigeria becomes part of the documents required by Section 3(1) of Banks and Other Financial Institutions Act[67] to be submitted to CBN for Application for grant of licence.

2.3 Operations of Non-Interest Bank

In conventional banking, deposits are accepted and its nature, pattern and extent of growth, stipulates the lending system. It carries cost both ways. The non-interest bank does not carry cost or deal in credit. Instead, it deals in equity.[68] CBN Circular has listed the instruments that could be employed and used by the non-interest bank for the purpose of carrying on its business under the Shariah. The instruments are as follows:

(a) Murabahah
(b) Mudarabah
(c) Musharakah
(d) Ijarah
(e) Salam
(f) Istisna
(g) Wadia
(h) Wakalah
(i) Sukuk[69]
(j) Any other financing mode or structure that is Shariah-compliant and approved by CBN.[70]

[66] Ibid.
[67] Cap. B3, Laws of the Federation of Nigeria, 2004, Op. Cit.
[68] Pramanik, A. H., Op Cit. p. 116
[69] CBN Circular, Op. Cit.
[70] Ibid.

For succinct understanding of each of the above mentioned instruments, it is expedient to give the meaning of each under the Shariah and how it operates under the system of non-interest bank. They are as follows:

2.3.1 *Murabahah*

Murabahah is simply *"a sale".* It is a business transaction whereby the seller expressly informs the purchaser how much cost he has incurred and how much profit he is going to charge in addition to the cost.[71] Most of non-interest banks and financial institutions are using *Murabahah* as Shariah mode of financing, and most of their financing operations are based on *Murabahah.* That is reason why this term has been taken into the economic circles today as a *method of banking operation.* The profit may be in lump sum or based on a percentage. The payment may be at a spot and may be on a subsequent date agreed upon by the parties.[72]

For *Murabahah* to be valid under the Shariah, all the basic ingredients of a valid sale must be present and fulfilled. Non-interest bank that wants to meet its clients' demand through *Murabahah,* must meet the following conditions:

(i) The subject matter of the sale must be in existence at the time of the sale;

(ii) The subject matter of the sale must be in the ownership of the seller at the time of the sale;

(iii) The subject matter of the sale must be in physical or constructive possession of the seller when he sells it to another person;

(iv) The sale must be instant and absolute. Thus, the sale should not be attributed to a future date or contingent on a future event;

(v) The subject matter of the sale must be a property of value;

(vi) The subject matter of the sale must be permissible under the Shariah and not something that is used for unlawful purpose under the Shariah;

(vii) The subject matter of the sale must be specifically known and identified to the purchaser;

[71] Al-Muwatta Ibn Malik, Translated by Siddiqi., R. W., (2011), Dar- Almanarah, Egypt, pp. 751-753
[72] Usmani., T.M. (2010), *An Introduction To Islamic Finance,* Qur'anic Studies Publishers, Karachi, p. 95

(viii) The delivery of the sold asset or commodity to the purchaser must be certain and should not depend on a contingency or future;

(ix) The price of the asset or commodity must be certain, and

(x) The sale must be unconditional.[73]

Non-interest bank that wants employ the instrument of *Murabahah* must ensure that all conditions for the sale of *Murabahah* are fulfilled. Though it should be the responsibility of the SAC of the bank to ensure that the product and transaction conform with the Shariah principles before embarking onto the instrument.[74]

2.3.2 *Mudarabah*

Mudarabah is one of the instruments approved by CBN for non-interest bank to employ for the purpose of carrying on its business activities. It is the association of capital and expertise into a single enterprise. The objective of this method is to mobilize funds from public on the basis of profit and loss sharing.[75]

This is a form of transaction that was in existence among the Arabs before the advent of Islam. The transaction was accepted by the Shariah because of its positive result and efficiency achieved in the functioning of the economic system. This counted for why the Holy Prophet Muhammad (p.b.u.h.) says thus: "In three (transactions) is blessing: *al-bay' ila ajal* (sale with postponed payment), *Muqaraba* (another name for Mudarabah), and mixing wheat with barley for home not sale."[76]

The term *"Mudarabah"* is also called by other names. The people of Hijaz called it *muqaradah* or *qirad.* The Iraq people called it *Mudarabah* and *mu'amalah.*[77]The word "*Mudarabah"* comes from the Arabic root *"dharaba fil-ardhi", meaning* "embarking upon a journey" or "going and working to earn a living."[78] It is a partnership in profit and not in capital. That is why the working partner (*mudarib*) is entitled to the profit by virtue of his effort and work. The other partner that provides capital for the partnership is called *"rabbul-mal".*

[73] Ibid.
[74] CBN Guidelines, Op. Cit.
[75] Bambale, Y.Y. Op. Cit. p. 178
[76] Ibid, In: Al-Kassani, Ala Eddin Abu Bakr, *al-Basda'I al-Sana'I fi tartib al-shara'i,* Matba'al-Misr, Egypt, vol. 6. P.56
[77] Ibid.
[78] Ibid.

Technically, *Mudarabah* is an agreement between at least two parties one of which provides capital while the other provides the labour and both parties share the profit, loss and liabilities according to the proportionate that they agree upon during the contract.[79]

It is also defined as a payment of capital to a working partner for a trading opportunity in an agreed manner. Profit will be distributed among parties, as agreed upon beforehand. Any loss incurred in the normal course of business is exclusively borne by the capital owner, the working partner is not liable for any loss.[80]

2.3.2.1 Legal Basis of *Mudarabah*

The legality for the exercise of *Mudarabah* can be found in the Holy Qur'an and Sunnah of the Prophet Muhammad (P.B.U.H.).

The Qur'anic verses that attest to the legality of *Mudarabah* are as follows:

1. …And others travelling throughout the land seeking (something) of the bounty of Allah.[81]

2. And when the prayer is ended then disperse in the land and seek of Allah's bounty, and remember Allah much, that ye may be successful.[82]

3. It is no sin for you that ye seek the bounty of your lord (by trading). But, when ye press on in the multitude from Arafat, remember Allah by the sacred monument. Remember Him as He hath guided you, although before ye were of those astray.[83]

The legality of *Mudarabah* in the Sunnah of the Holy Prophet Muhammad (P.B.U.H.) is as follows:

1. The Holy Prophet Muhammad (P.B.U.H.) had practiced *Mudarabah* with *Khadijat* before the coming of Islam.[84]

2. After coming of Islam, the Prophet Muhammad (P.B.U.H.) acknowledged and sanctioned the practice of *Mudarabah.*[85]

2.3.2.2 Constituents of *Mudarabah*

[79] Ibid.
[80] Ibid.
[81] Ibid., Qur'an Chapter 73 v. 20.
[82] Ibid., Qur'an Chapter 62 v. 10.
[83] Ibid., Qur'an Chapter 2 v. 198.
[84] Bambale, Y.Y. Op. Cit., p.180
[85] Ibid.

The Constituents of *Mudarabah* consist the following:

(a) *Rabbal-mal,* meaning the owner of the capital, investor or financier. *Rabbal-mal* entrusts his capital or money to another party with the hope that at the end of the business transaction he will not only get back his principal sum but also the pre-agreed share of profit. He bears the loss alone.[86]

(b) *Mudarib* means the working partner, manager or agent. He is regarded as a trustee as he takes the other partner's capital on trust. He is a hired person and works himself on the capital. He is a representative as he freely disposes the capital as well as a partner because he shares in the profit if any. In case of loss, he loses the profit of his effort.[87]

(c) The subject matter, which refers to *Mudarabah* capital. This must be cash or money capital for it to be valid. The capital must be definite in the form of money, gold, silver, etc.[88]

2.3.2.3 Liability of the *Mudarib*

In the *Mudarabah* partnership, the liability of loss is borne by the *Rabbul-mal* unless:

(a) Where *Mudarib* transgresses and violates the stipulations of the capital owner;[89]

(b) Where *Mudarib* is deemed negligent which occasioned the loss,[90] and

(c) Where the *Mudarib* [91]dies without an explanation on the transaction as to the profit or loss, compensation is due from the estate of the deceased *Mudarib.*

2.3.2.4 *Mudarabah* as an Instrument for Non-Interest Banking Transaction

Mudarabah is one of the accepted instruments by CBN,[92] which could be used by non-interest bank to generate profit for its shareholders and customers that maintain investment accounts with the bank.

[86] Ibid.
[87] Ibid, p.181
[88] Ibid.
[89] Ibid.
[90] Ibid. p.182
[91] Ibid.
[92] CBN Circular, Op. Cit.

Most of conventional banks in Nigeria participate in project financing with a view to developing the economic sector and other projects for human development that are being carried out by government and private institutions. Some of the project executors are private companies that usually source money from financial institutions for the execution of the project.

In case of project financing, the traditional method of *Mudarabah* can easily be adopted by non-interest bank, whereby the bank would finance the whole project, in which the project executor would be responsible for carrying out the project (who is described here as *the Mudarib).* This could be done where an Agreement for the project financing will authorize the bank to appoint a Project Consultant for successful completion of the project. The expenses for engaging the Project Consultant should be borne by both parties on an agreed proportion.

For non-interest bank to participate in *Mudarabah* business as the *Rabbul-mal,* the following conditions must be met as provided for by the Shariah principles:[93]

(a) The bank would provide the entrepreneurs with its capital on the basis of *Mudarabah.*

(b) The financial liability of the capital provided by the bank would be borne by itself, (except where there is negligence, recklessness or breach of any terms of *Mudarabah* by the entrepreneur).

(c) The financial liability of the bank must not exceed its capital (the highest loss to be suffered can thus be equal to the total capital invested).

(d) The distribution of profit may take place before the closing audit of the accounts.

(e) On completion of business, the bank may have its capital refunded along with any increase or decrease according to profit or loss.

(f) At the outset, it is essential to determine the extent of capital already invested in the business or that which is being invested now in addition to capital provided by the bank on an earlier occasion.

(g) It is necessary to draw up a fresh Agreement for any additional investment in the business whether of capital from another source or from the bank itself.

(h) In case of both definite and indefinite term of investment, the bank may at any time withdraw its capital with the consent of the entrepreneur. The bank may however, be required to wait for sometime for the completion of its account which may extend to a quarter.[94]

[93] Siddiqi, M.N., Op. Cit., p.36

In the same vein, the bank may allow its customers to operate *Mudarabah* Account as Profit Sharing Investment Account as approved by CBN[95]. The bank would make the following contract with depositors who hold a *Mudarabah* account, in which the bank would act as an *Agent* of the depositors in identifying the appropriate client that would use the fund as *Mudarib* while the depositor is regarded as a *Rabbul-mal:*

(i) The account opening for *Mudarabah* investment would provide a Clause whereby the account holder appoints the bank as his agent for using the fund for *Mudarabah* business with a third party;

(ii) The bank will invest the fund along with its own. The aggregate profit earned on the total capital will be divided over it;

(iii) After such a division an agreed percentage or fraction of the profit will be given to the bank and will be transferred or given to the depositors. The proportion of profit–division will be determined with the mutual consent of the parties concerned;

(iv) If the bank suffers a loss, the loss will be spread over the entire capital of the business in case the bank involved its capital. The loss apportioned as a result of such calculation will be borne by each account –holder (depositor).[96]

Where the bank does not involve its capital in the *Mudarabah,* the loss shall be borne by the depositors in the *Mudarabah* account. Similarly, CBN Circular[97] enjoined the bank to give in writing to the depositors in the Profit Sharing Investment Account that the risk of loss rests with the client(s) and that the bank will not share in the loss unless there is proven negligence or misconduct for which the institution is responsible.

(v) Total liability of an account–holder will not exceed his total investment, which means the maximum loss he will suffer will be his total investment. If the bank invests capital in a business and expands it beyond the limits of *Mudarabah* investment and shareholders' capital, and consequently suffers so much loss that the entire investment is lost but the

[94] Ibid.
[95] CBN Circular, Op. Cit.
[96] Siddiqi, M.N., Op. Cit., p.39
[97] CBN Circular, Op. Cit.

payable loans still remains, then the *Mudarabah* account-holders shall not be asked to pay in more funds. Such a demand can only be made from partner shareholders.

(vi) If the account holder wishes to continue the contract, the profit earned in the subsequent quarter will first be set against the past loss, where applicable, and then the remaining profit, if any, will be divided among the parties according to an agreed ratio. It is also possible for any depositor to study the quarterly and final accounts and decide to withdraw his money together with the profit or loss. He can also deposit it in the bank under a new *Mudarabah* account. In this case, actual withdrawal is not necessary: it should be sufficient after settlement of account to inform the bank about the renewal of the contract. Future profit or loss has no connection with past profit or loss in the case of a reneged contract.[98]

(vii) The account holder can demand his money whenever he likes. But for the *Mudarabah* accounts, he must wait till the end of the current quarter unless the bank agrees that the preceding quarterly account can be made the basis for clearing the account. The money in *Mudarabah* account can neither be drawn upon nor transferred to other persons through cheques. To withdraw the deposit, notice of the intention to do so should be given, unless the bank waives its right to appropriate notice in any particular case. Money may be deposited in *Mudarabah* account without fixing a time –limit and/or for a fixed term, for example, three or six months.[99]

Undoubtedly, *Mudarabah* account is one of the most functional business activities of non-interest banking. Therefore, risk mitigating factors should be in place in order to identify the risks of any business the Bank will finance and put proactive measures for those foreseeable risks. That is the reason why CBN Circular[100] made it compulsory that all risks associated to the Investment accounts should be solely borne by the account holder. This is because, the depositors that want the Bank to invest their deposit in *Mudarabah* business should be informed of the risks associated with the

[98] Siddiqi, M.N., Op. Cit., p.40
[99] Ibid.
[100] CBN Circular, Op. Cit.

business, to enable them make their choice before dwelling into the business with their deposits. Thus, this proviso must be stated in the Agreement that would be entered into between the Bank and the customer that particularly operates Investment account.[101]

2.3.3 *Musharakah*

As a vehicle for establishment of non-interest bank under the Shariah, *Musharakah* has been defined previously in this chapter during the formation of the bank by the individuals that want to do banking business on the principles of Islamic Commercsial Jurisprudence. Our concern here would be on how the bank could use the instrument of *Musharaka/Sharika* in generating profit for its shareholders as well as its customers that operate Investment account.

2.3.3.1 Nature of the Capital of *Musharakah*

Most of the Muslim jurists are of the opinion that the capital invested by each partner must be in liquid form. It means the contract of *Musharakah* can only be based on money and not on commodities. Therefore, the share capital of the joint venture must be in monetary form. No part of it could be distributed in kind.[102] However, there are different views in this respect:

Imam Malik is of the view that the liquidity of capital is not a condition for the validity of *Musharakah.* Therefore, it is permissible that a partner contributes to the *Musharakah* in kind, but his share shall be determined on the basis of evaluation according to the market price prevalent at the date of the contract. This view is also adopted by some Hambali jurists.[103]

On the other hand, Imam Abu Hanifa and Imam Ahmad are of the view that no contribution in kind is acceptable in *Musharakah.* In holding the view, they rely on two reasons-

Firstly, they maintained that the commodities of each partner are always distinguishable from the commodities of the other. Therefore, so far as the property of each partner is distinguished from the property of the other, no partnership can take place.[104]

Secondly, they maintained that there are number of situations in a contract of *Musharaka* where the partners have to resort to redistribution of the share-capital to each partner. If the share-capital was in the form of commodities, such redistribution cannot take place, because the commodities may have been sold at that time. If the capital is repaid on the basis of its value, the value may have increased, and there is a possibility that a partner gets all the profit of the business, because of the appreciation in the value of the commodities he has invested, leaving nothing to the other partner. Conversely, if the value of the commodity decreases, there

[101] Ibid.
[102] Usmani., M.T. Op. Cit., p. 38
[103] Ibid.
[104] Ibid.

is a possibility that one partner secures some part of the original price of the commodity of the other partner in addition to his own investment.[105]

Imam Al-Shafi'i has come in between the two points of the view explained above. He says that commodities are of the two kinds:

Dhawatul-amthal- that is the commodities which, if destroyed, can be compensated by similar commodities in quality and quantity, wheat and rice;
Dhawatul-qeemah- that is the commodity which cannot be compensated by a similar commodity, like cattle. Each head of sheep, for example, has its own characteristics which could not be found in any other head. Therefore, if somebody kills the sheep of a person, he cannot compensate him by giving him a similar sheep. Rather, he is required to pay their price.

According to Imam Al-Shafi'i, the commodities of the first kind (*dhawatul-amthal)* may be contributed to the *Musharakah* as a share of the partner in the capital, while the commodities of the second kind (*dhawatul-qeemah*) cannot form part of the share-capital.[106]

Considering the nature of banking transaction in Nigeria vis-a-vis CBN Circular thereto, we should take the view of Imam Abu Hanifa and Imam Ahmad that the contributions of partners to *Musharakah* should be in monetary form and not in any other kind. This is because, the first capital that is required for the establishment of or participation of non-interest bank in partnership is in monetary form, with which all other facilities for the running of the business could be acquired with money contributed by the partners.

Succinctly, another way of profitably using capital, as approved by CBN, is for the bank to be a partner in the business with an entrepreneur. Both the entrepreneur and the bank share in the investment and run the business. The hired representatives and experts of the bank work alongside the entrepreneur. A Partnership Deed specifies the nature of the business, the limits within which it is to be conducted, length of the term of agreement, and the proportion in which profits are to be distributed. The loss, however, must be borne proportionately to investment capital. At the completion of the business or at the time of winding up of business, the profit or loss will be determined. The net capital would be returned to the partners along with profit after deducting any loss.[107]

When the bank executes a partnership contract, provision is made in the contract document that the financial liabilities of the bank shall not exceed the contributed capital. This is possible when the bank has invested its capital on the principle of *Sharikatul-Inan* and its business is run on the condition that it will not be expanded beyond the partnership capital. When taking or giving loans or credit, a limit should be set such that, at any given time, the financial liability of the joint business will not exceed the total of its cash deposits and/or other assets.

[105] Ibid. pp.124-125
[106] Ibid. p.40
[107] Siddiqi, M.N., Op. Cit., p. 21

2.3.4 *Ijara*

Leasing is one of the important modes of financing by non-interest financial institutions, with the purpose of enabling clients to use durable goods and equipments such as heavy equipments, aircrafts and industrial plants used in manufacturing and production enterprises without gaining their legal ownership. Many companies around the world practice this mode of finance as one of their main source for finance.

To enable non-interest bank render its services to its clients on equipment lease for the purpose of meeting their business or personal demands, as it applies to conventional banks, CBN Circular[108] permits non-interest bank to employ this type of instrument, as it applies under the principles of Shariah. This is because the contract for hire and lease is a recurrent phenomenon in the lives of people concerning their different interests and their daily, monthly and yearly dealings. *Ijara* is a type of contract that involves the use of an object, and only the right to use the object is transferred.[109]

Ijara, literally connotes renting something or hiring someone else's services in return for a certain payment.[110] Technically, it means a lease for a lawful identified use of either identified present or described anticipated thing, for a specified purpose and for a known period of time or for the performance of a certain service in return for a specified compensation.[111]

From the above definitions, it should be understood that the term *Ijara* is used for two different situations. In the first place, it means to "employ the services of a person on wages given to him as a consideration for his hired services." The second meaning, on the other hand, means the transfer of the usufruct of a particular property to another person in exchange for a rent claimed from him. In this case, the lessor is called "*Mu'jir",* the lessee is called "*Musta'jir"* and the rent payable to the lessor is called "*Ujrah".*

2.3.4.1 Conditions for the contract of *Ijara*

Ijara contract must fulfill the following conditions for it to be valid under the Shariah:

(i) The lease must relate to the use of object and not the object itself. Thus the object must have a valuable use;

(ii) The use of the object must be lawful;

[108] CBN Circular, Op. Cit.
[109] Bambale, Y.Y., Op. Cit., p. 127
[110] Ibid.
[111] Ibid.

(iii) The purpose of renting must be known by both parties. Therefore, the lessee cannot use the asset for any purpose other than the purpose specified in the lease agreement;

(iv) If the rent of the object is not identified (present), it should agree with the description of its owner;

(v) The period of the rent should be specified. Thus the period of the lease must be determined in clear terms;

(vi) The rental payment or remuneration for the hiring should be specified so as to avoid deceit or dispute, and

(vii) There must be at least two persons and their consent.[112]

For the purpose of this work, we would not dwell in the entire topic of *Ijara* as it applies under the Shariah, rather on the areas that correspond with the services of non-interest bank.

2.3.4.2 *Ijara* as a mode of financing

Lease is not originally a mode of financing. It is simply a transaction meant to transfer the usufruct of a property from one person to another for an agreed period against an agreed consideration. However, some financial institutions have adopted leasing as a mode of financing instead of long term lending on the basis of interest. This kind of lease is known as the "*financial lease*".

CBN realized that leasing is a lawful transaction according to the Shariah and can be used as an interest free mode of financing. Therefore, leasing has been adopted as one of the instruments non-interest bank operating in Nigeria could use to generate profit for its shareholders.[113]

The non-interest bank, as a lessor, purchases the assets through the lessee himself. The lessee purchases the assets on behalf of the lessor, who pays its price to the supplier, either directly or through the lessee. According to the Shariah, the lease commences and the rent becomes chargeable after the lessee has taken delivery of the asset, and not from the day the price has been paid. If the supplier has delayed the delivery after receiving the full price, the lessee should not be liable for the rent of the period of the delay.[114]

2.3.5 *Salam*

[112] Ibid.
[113] CBN Circular, Op. Cit.
[114] Usmani., T.M., Op. Cit. pp.164-165

It is one of the basic conditions for the validity of a sale in the Shariah that the commodity intended to be sold must be in actual or constructive possession of the seller. The condition has three ingredients as follows:

(a) The commodity must be in existence;

(b) The seller should have acquired the ownership of that commodity, and

(c) The seller should have a physical or constructive possession of the commodity.

There are two exceptions to this general principle in the Shariah. One of the exceptions is *Salam* and the other is *Istisna'* (the latter exception would be discussed hereafter). Both are sale of a special nature and they could be used for the purpose of financing.

Salam literally signifies a contract involving a prompt payment in return of future delivery. Also it is the payment in advance with delaying the receipt of the sold goods.[115]

It could be deduced from the above definitions that *Salam* is a sale whereby the seller undertakes to supply some specific goods to the buyer at a future date in exchange of an advanced price fully paid at the spot.[116]

2.3.5.1 Legal basis for *Salam* contract under the Shariah

This kind of transaction is permissible according to the Holy Qur'an and *Sunnah* of the Holy Prophet Muhammad (P.B.U.H.) as follows: "O you who believe! When you contract a debt for a specified period, write it down."[117]

It is narrated from Ibn Abbas (may Allah be pleased with him) that Prophet Muhammad (P.B.U.H.) has this to say: "whoever pays in advance the price of a thing to be delivered later should pay it for a specified measure at a specified weight or specified period."[118]

2.3.5.2 Conditions for the validity of *Salam* contract

The permissibility of the *Salam* contract is dependent upon the following conditions:[119]

(a) The price of the goods sold must be fully paid. The goods must be specified by measurement of capacity, weight, number or length.

[115] Bambale, Y.Y., Op. Cit. p. 67
[116] Al-Muwatta Ibn Malik, Op. Cit., pp. 741-742
[117] Bambale, Y.Y., Op. Cit., Quran, Chapter 2 V. 282.
[118] Bambale, Y.Y., Op. Cit. p. 68.
[119] Ibid., p.69

(b) The goods must be an article which can be determined by description.

(c) Effecting payment at the time of concluding the contract.

(d) There must be a specified future period for receiving the goods sold. Immediate delivery of goods renders *Salam* contract invalid. This view is maintained by the jurist of *Hanafi* School, because of the *Hadith* of Prophet Muhammad (P.B.U.H.) which says thus: "whoever enters into *Salam* contract with you, let him stipulate a definite weight and measurement and a definite period of delivery."[120]

The jurist of *Shafi'I* School, on the other hand, are of the view that the delivery of the goods in *Salam* contract needs not necessarily be postponed to a future date, but it may be immediate. The reason given by them in this respect is that the future delivery of the goods is to be authorized in order to facilitate the seller to acquire the subject matter of the sale and deliver it to the purchaser. The delivery is therefore not essential to *Salam* contract.[121]

Muslim jurists differ on the extent of the period or time fixed for the delivery of the subject matter in *Salam* contract.

Hanafi, Maliki and Hanbali jurists fixed the maximum period of one month for the delivery of the subject matter of *Salam* contract. While the Shafi'is did not fix the period of delivery because, according to them, it is not a condition. Instead, it should be allowed to be determined by the parties.[122] All other conditions essential for the validity of the normal contract of sale apply to *Salam* contract.

Similarly, it is necessary, according to the Hanafi School, that the goods (for which *Salam* contract is effected) remains available in the market right from the day of contract up to the date of the delivery. Therefore, if the goods are not available in the market at the time of the contract, *Salam* cannot be effected in respect of that goods.[123]

However, the other three Schools of jurists, i.e. Shafi'I, Maliki and Hanbali, are of the view that the availability of the goods at the time of the contract is not a condition for the validity of *Salam.* What is necessary, according to them, is that it should be available at the time of delivery.[124]

2.3.5.3 *Salam* as a mode of Financing

[120] Ibid.
[121] Ibid.
[122] Ibid.
[123] Usmani., T.M., Op. Cit., pp. 189-190
[124] Ibid.

It is evident from the foregoing discussion that *Salam* is allowed by Shari'ah to fulfill the needs of farmers and traders. Therefore, it is basically a mode of financing for small farmers and traders. This mode of financing can be used by non-interest bank to finance agricultural sector. In this regard, there are two ways non-interest bank can benefit from the contract of *Salam,* thus:

(a) After purchasing the goods by way of *Salam,* non-interest bank may sell the goods through a parallel contract of *Salam* for the same date of delivery. The period of *Salam* in the second (parallel) transaction being shorter, the price may be a little higher than the price of the first transaction, and the difference between the two prices shall be the profit earned by the non-interest bank. In this way the non-interest bank may manage its short term financing portfolios.[125]

(b) If the parallel contract of *Salam* is not feasible for one reason or another, non-interest bank can obtain a promise to purchase from a third party. This promise should be unilateral from the expected buyer. Being merely a promise and not an actual sale, their buyer would not have to pay the price in advance. Therefore, a higher price may be fixed and as soon as the goods are received by the non-interest bank, it would be sold to the third party at a pre-agreed price, according to the terms of the promise.[126]

For example, if the non-interest bank purchased ten tones of fertilizer from a foreign company by way of *Salam,* to be delivered on 4th October, the non-interest bank can contract a parallel contract of *Salam* with Nigerian company to deliver to the non-interest bank ten tones of fertilizer on 4th October. However, while contracting parallel *Salam* with Nigerian company, the delivery of ten tones of fertilizer to the Nigerian company cannot be a condition to taking delivery from the foreign company. Therefore, if the foreign company did not deliver the fertilizer on 4th October, the non-interest bank is duty bound to deliver the fertilizer to the Nigerian company.

2.3.6 *Istisna'*

Istisna' literally is derived from the Arabic word "*Sana'a",* meaning "making, manufacturing or constructing something". Therefore, *Istisna'* occurs when someone invited or caused another to

[125] Ibid, p.193
[126] Ibid.

make a thing or when someone asked something to be made for him.[127] Technically, *Istisna'* refers to an agreement between two parties for making or manufacturing a particular article for which one of the parties will offer a labourer or artist to make a particular article for a definite price with a certainty of quality or quantities of the articles within a prescribed period. The price of the article is to be paid once the article is made.[128] It is also defined as a contract for selling of a manufactured thing with an undertaking by the seller to present it manufactured from his own material, with specified descriptions and at a determined period.[129]

Istisna' (contract of manufacturing) is a special kind of contract in which the manufacturer undertakes to make an item on certain conditions. It is a contract based on a custom or practices that originated from the period of Holy Prophet Muhammad (p.b.u.h.) and justified by equity and necessities of the business.[130]

The contract of *Istisna'* creates an obligation on the manufacturer to manufacture the goods, but before he starts the work, any one of the parties may cancel the contract after giving a notice to the other. However, when the manufacturer started the work, the contract cannot be cancelled unilaterally.[131]

2.3.6.1 Legal Basis of *Istisna'*

The legality of *Istisna'* is based on the Shariah. The Holy Quran says: "(Such is) the artistry of Allah, who disposes of all things in perfect order: For He is well acquainted with all that ye do."[132]

The last verse represents a direct guidance in the Holy Qur'an for the legality for the contract of *Istisna'.*[133]

Furthermore, the legality of *Istisna',* in Hadith, is based on the following:

The Prophet Muhammad (P.B.U.H.) ordered the manufacturer of a ring to make a ring for him.[134]

(a) The Holy Prophet (P.B.U.H.) ordered the construction of a pulpit made of *tamarish* (wood).[135]

The legality of *Istisna'* is also based on *Ijma,* where the jurists are unanimous but only differed on its nature as either being a sale, promise or rent.[136]

[127] Bambale, Y.Y., Op. Cit. p.187
[128] Ibid.
[129] Ibid.
[130] Bambale, Y.Y., Op. Cit., p.185
[131] Usmani., T.M., Op. Cit. p.196
[132] Bambale, Y.Y., Op. Cit., Qur'an, Chapter 27 v.88
[133] Ibid., p. 188
[134] Ibid. p. 187
[135] Ibid.

Similarly, the legality of *Istisna'* is based on *Qiyas.* Though *Istisna'* is a contract where the subject matter does not exist, as its declared to be illegal according to the majority of jurists, because it is against *Qiyas.* However, it is argued that, though the subject matter in this contract does not exist, its availability is certain and there is no risk. Therefore, any contract that is free from excessive risk (*gharar*) is a contract in accordance with *Qiyas.*[137] In the same vein, the legality of *Istisna'* contract is also sanctioned under public interest (*maslaha*). The use of this contract in building construction, shoes, furniture and other items is a demonstration of the general need.[138]

2.3.6.2 Conditions for the legality of *Istisna'*

The conditions for the legality of *Istisna'* are as follows:

(i) The object of the contract must be precisely determined both in quantity and essence.

(ii) The time for delivery must be specified.

(iii) The place of delivery must be specified.

Imam Abu Hanifa is of the view that the time of delivery must not be stipulated in the contract of *Istisna',* otherwise the contract will be a contract of *Salam.* Whereas, the two disciples of Imam Abu Hanifa are of the view that it is a condition to stipulate a time of delivery and that would not transform it to a contract of *Salam.*

(iv) The material for the object or subject matter must be supplied by the maker.[139]

2.3.6.3 *Istisna'* as a mode of financing

Istisna' can be used for providing the facility of financing in certain transactions, especially construction. If the customer has his own land and seeks financing for the construction of a house, the non-interest bank may undertake to construct a house on that open land on the basis of *Istisna'.* Also, if the customer has no land and he wants to purchase the land, the non-interest bank may undertake to provide him a constructed house on a specified piece of land.[140]

Since it is not necessary in *Istisna'* that the price is paid in advance, nor is it necessary that it is paid at the time of delivery, therefore, the time of payment may be fixed in whatever manner the parties wish. Also, the payment may be in installments.[141]

On the other hand, it is not necessary that the bank itself constructs the house. It can enter into a parallel *Istisna'* with a third party or may hire the services of a contractor (other than the customer).

[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Zowk. O. (2011), *A Brief Sense On Islamic Business Practices,* Dar-Al-Qur'an, London, p.81.
[141] Usmani., T.M., Op. Cit. p.199

In both cases, the bank can calculate its cost and fix the price of *Istisna'* with its customer in a manner that may give him a reasonable profit over its cost. The payment of installments by the customer may start right from the day when the contract of *Istisna'* is signed by the parties, and may continue during the construction of the house and after same is handed over to the customer. In order to secure the payment of installments, the title deeds of the house or land or any other property of the customer may be kept by the Bank as a security, until the last installment is paid by the customer.[142]

The bank, in this case, will be responsible for the construction of the house in full conformity with the specifications detailed in the agreement. The instrument of *Istisna'* may also be used for project financing on similar lines. If the customer wants to install an air conditioning plant in his factory, and the plant needs to be manufactured, the bank may undertake to prepare the plant through the contract of *Istisna'* according to the aforementioned procedure.[143]

The modern Build, Operate and Transfer (BOT) agreement may also be formalized on the basis of *Istisna'.* If a government wants to construct a highway, it may enter into a contract of *Istisna'* with a builder. The price of the *Istisna'* may be the right of the builder to operate the highway and collect tolls for a specified period. In this case the bank may come in to participate with a view to generating lawful income, free from interest, for its clients.

2.3.7 *Wadia*

Considering the enormous responsibilities of the non-interest bank towards developing the economy in the society to the benefit of low income earners, CBN permits the non-interest bank to generate income through rendering services to its clients pursuant to CBN Circular.[144] As income from these services may be more than their cost to the bank, this will be an important source of profit. In addition, they will meet important social needs of commerce. Since these services are rendered by all conventional banks for fee, commission or fixed charges, but without interest, the non-interest bank is equally allowed to render those services to its esteemed clients. One of those services that could be rendered by non-interest bank is Safe deposits. The bank could provide lockers for deposit of jewelry, important papers and documents, receipts and other valuables; it will take responsibility for their security in return for reasonable charges.

Similarly, non-interest bank can operate deposit accounts for its customers which are not committed for investment, which take the form of current and saving accounts. In this case the Bank gives guarantee to the depositors of getting their full amount back from the bank, but the bank is not obliged to pay any rewards to the savers. In this arrangement, the savers will allow the bank to use their money on condition that the money will be returned in full on demand.[145]

[142] Ibid.
[143] Bambale, Y.Y., Op. Cit. p.190-191
[144] CBN Circular, Op. Cit.

[145] Ahmed, Z., *et al*, (1983), *Money and Banking In Islam,* Pap-Board Printers Limited, 277, Peshawar Road,

2.3.8. *Wakala*

As an instrument for the operation of non-interest bank in Nigeria, *Wakala* literally means to guard, to entrust a matter to another and to rely on him. Technically, *Wakala* is defined as a substitution of a principal by an agent to perform a work permitted by him. In other words, it is the substitution of a person in his own place by another person to dispose of the things for which he has a power.[146]

2.3.8.1 Authority for *Wakala*

There are many Quranic verses, traditions of the Prophet Muhammad (P.B.U.H.) and consensus of jurists permitting the exercise of *Wakala.* The following verses attest to the fact of agency:

(a) [Joseph] said: appoint me over the storehouses of the land.[147]

(b) Now send ye then one of you with this money of yours to the city.[148]

The above verses justified that agency relationship is permissible in the Shariah.

Similarly, the Holy prophet Muhammad (P.B.U.H.) authorized Urwah Ibn Ja'd to buy an ewe for him. He also authorized Abu Rafi to perform the marriage contract on His behalf with Maymunah.[149]

For the purpose of using *Wakala* as an instrument for non-interest bank's operations, all essential element of contract must be fulfilled. In this regard the bank enters into a *Mudarabah* agreement with an entrepreneur for the purpose of doing business with the capital provided by the bank, while the agent provides services towards utilizing the capital for profit gain.[150]

2.3.8.2 Essential Elements of *Wakala*

For a valid *Wakala*, the following conditions must be met:

(i) Both the principal and the agent must be adult. However, some jurists (including Hanafis) are of the view that a child who attains the age of discrimination can appoint another person as his agent to perform a deed that is beneficial to him, such as acceptance of gift or will.[151] Similarly, the principal must have a full authority of disposing of the matter of which performance he entrusts to

Rawalpindi Cantt., Pakistan, pp. 263-264.
[146] Bambale, Y.Y., Op. Cit., p.115
[147] Ibid., Quran, Chapter 12 v. 55
[148] Ibid., Quran, Chapter 18 v. 19
[149] Ibid., p. 116.
[150] Ahmed, Z., *et al*, Op. Cit., p. 263
[151] Bambale, Y.Y., Op. Cit., p.117

another.[152] In the same vein, the principal can appoint a minor as his agent, with the consent of the minor's guardian, for a sale or purchase in favour of the principal.[153] Likewise, the agent must have the authority for a thing for which he is appointed as agent himself.[154]

(ii) the subject matter or object of agency must be the act of performing of a duty which the principal could perform himself. These acts could be all sorts of contract, including marriage and divorce. It could also be on the matters relating to Allah's rights like distribution of *Zakka, Hajj, Umra,* fulfillment of vows and expiation.[155]

2.3.8.3 *Wakala* as an Instrument for the Operation of Non-Interest Banking Business

As a result of flexibility of the non-interest bank operation, as enjoined by Shariah, the non-interest bank can act as an agent of its customers in entering into the contract of buying and selling, settlement of debts, acquisition of properties, as approved by CBN.

This instrument is additional source of generating incomes for the shareholders of the non-interest bank as well as simplifying the lives of general public in Nigeria that do not have time to do some transaction by themselves. The contract of *Ijara* between the non-interest bank and its customer must be in writing, whereby the terms and conditions must be specifically stated. The bank and the customer should also agree on the bank's fees for the agency.

2.3.9 *Sukuk*

It is not only CBN that made a giant effort towards the liberalization of financial sector in Nigeria. The inclusion of *Sukuk* as one of the instruments for the operation of non-interest banking and financial institutions in Nigeria by CBN Circular, the Security and Exchange Commission also made rules[156] governing the *Sukuk* transaction pursuant to Section 313(6) of the Investments and Securities Act, 2007 (as amended).[157]

Literally, *Sukuk* refers to the Islamic equivalent of bonds. Issuance of paper representing commodities for salary payments in the early Islamic period was called "*Suk*". "*Sukuk"* is the plural of "*Suk*".[158]

To be in accordance with Shariah, there must be an actual transfer of ownership of the underlined assets taking place.[159]

[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] The Rules were made on 28th February, 2013.
[157] SEC Rules on *Sukuk* issuance, 2013.
[158] http://en.wikipedia.org/wiki/Sukuk, accessed on 23rd July, 2014.

Modern day *Sukuk* has sorted out the original concept to create certificates representing undivided shares in the ownership of:

(i) Tangible assets.

(ii) Usufruct of an asset.

(iii) Particular projects or special investment activities.

As opposed to conventional bonds, which merely confer ownership of a debt, *Sukuk* grants the investor a share of an asset, along with the commensurate cash flows and risk. As such, *Sukuk* securities adhere to Shariah principles, which prohibit the charging or payment of interest.

The emergence of *Sukuk* has been one of the most significant developments in Islamic capital markets in recent years. Put simply, *Sukuk* instruments act as a bridge.[160] They link their issuers, primarily sovereigns and corporations in the Middle East and Southeast Asia, with a wide pool of investors, many of whom are seeking to diversify their holdings beyond traditional asset classes. In this way, funds raised through *Sukuk* can be allocated in an efficient and transparent way to infrastructure initiatives and other deserving projects in the 56 member countries of Islamic Development Bank, as well as communities in over 100 non-member countries.

Sukuk issuance has proven its resilience during recent periods of turbulence in global capital markets. *Sukuk* issuance increased from US$ 14.9 billion in 2008 to US$ 23.3 billion in 2009, with Asia showing particular strength. Even so, the *Sukuk* market is still a niche one, with huge potential for growth. The *Sukuk* growth rate is currently 10-15% in global financial markets.[161]

2.3.9.1 Structuring *Sukuk* Transaction in Nigeria

Sukuk has been structured as follows:

(i) *Sukuk Ijarah* – (leased contract)

(ii) *Sukuk Musharakah*– (sharing contract)

(iii) *Sukuk Istisnah*– (exchange contract)

(iv) *Sukuk Murabahah*– (financing contract)

(v) Any other form of contract approved by the Commission[162]

[159] http://thatswhy.isdb.org/irj/go/km/docs/documents/IDBDevelopments/Internet/thaswhy/en/sul, accessed on 23rd July, 2014.
[160] Ibid.
[161] Ibid.
[162] Security and Exchange Commission Rules on *Sukuk*, Op. Cit.

2.3.9.2 Benefits of *Sukuk*

For non-interest financial institutions in Nigeria, *Sukuk* offers considerable advantages some of which are as follows:

(i) Liquidity Management- *Sukuk* with different majorities combined with an active secondary market provide an excellent tool for Non-Interest Finance Institutions to help manage its liquidity. The non-interest bank with excess liquidity may choose to invest in *Sukuk* that will offer a return and can be traded if required.

(ii) Fund raising- *Sukuk* can provide a tool for corporate bodies that are in need of cash for specific objectives to raise the necessary funds.

(iii) Securitisation- *Sukuk* can be used by the non-interest bank as a means to release in funds tied up in assets through securitisation and then to reinvest the proceeds.

(iv) Balance Sheet Management- *Sukuk* can be used by corporate bodies to achieve an optimum balance between debt and equity on their balance sheet.

2.3.9.3 Benefits for Investors

(i) Shariah Compliant Asset Class- The benefits include the ability to invest in the Shariah compliant asset class which generally offers a lower level of risk and a predictable rate of return.

(ii) Tradability- If the investors are in need of cash, then these instruments are tradable and

(iii) allows for easy liquidation.[163]

2.3.9.4 Eligibility for *Sukuk*

Public companies, State Governments, Local Government, and Government Agencies as well as multilateral agencies are eligible to issue, offer or make an invitation of *Sukuk* upon seeking the Commission's approval under these rules.[164]

[163] Ibid.
[164] Ibid.

Indeed, non-interest bank can offer multifarious services to its customers in line with the dictates of the Shariah. The dynamism and liberalism of operation of non-interest bank would no doubt give opportunities to every individual to enjoy such banking services with a view to providing job opportunity and wealth creation. Certainly, non-interest banking conforms with the constitutional motive of economic development as provided for by section 16(2)(a), Constitution of Federal Republic of Nigeria, 1999 (as amended). Conformity with the constitutional motive of economic development does not also distance non-interest bank from meeting its social objectives as follows:

(i) Non-interest banking and financing is not centered only on credit worthiness and ability to repay the loans and interest; instead the worthiness and profitability of a project are the most important criteria of non-interest financing while the ability to repay the loan is sub-segmented under profitability.

(ii) One of the unique and salient characteristics of non-interest banks is that the integration of ethical and moral values with its banking operation. The ethical and moral consideration of non-interest bank cannot be detached and its behaviour should be consistent with the moral and ethical standards laid down by the principles of Islamic Commercial Jurisprudence[165].

(iii) Furthermore, non-interest bank eliminates the barrier between those who save and those who invest, and bring them closer to the real market. The nature of the financial intermediation of non-interest bank significantly differs from the conventional banks and it is in harmony with real market and developmental changes in it.

(iv) Another important characteristic which forms the basis for the development of non-interest bank is the relationship with depositors. It deals with its customers on investment grounds rather than a pre-determined fixed interest rate. It invests the money of its depositors on

[165] The practice of employing unmarried women by conventional banks with a view to mobilizing deposit from customers is well known to the general public. This practice has undoubtedly posed threat to the dignity of our women in the society.

profitable projects after going through a strategic analysis in order to give a substantial return to its depositors.

(v) Unlike the conventional banks, the financing of non-interest bank is restricted to useful goods and services and refrain from financing alcoholic beverages and tobacco or morally unacceptable services such as casinos and pornography, irrespective of whether or not such goods and services are legal in Nigeria.[166]

(vi) In contrast with conventional banks, non-interest bank does not consider only the credit worthiness and interest rate as standards; instead it must apply the principles of Islamic moral/ethical criteria in its provision of financing. This adds another merit for non-interest bank since there is a beneficial impact on the productivity in the economy, as it reduces the social and economic cost of such harmful products and activities.

If non-interest banking operation grows in Nigerian banking industry, each bank will attempt to out-perform other banks if it wants to attract funds from depositors. And the ultimate result is a high return on investments for the investors, which is unlikely in the conventional bank where it deals with its depositors on a pre-determined fixed interest rate. Certainly, the operation of non-interest bank is also in line with social justice as every aspect of economic activities may benefit from the operation of non-interest bank.

[166] It is medically proved that alcohol and tobacco are dangerous to life. Therefore, financing their business will breed social decadence and diseases.

CHAPTER THREE

LEGAL BASIS FOR OPERATION OF NON-INTEREST BANKING IN NIGERIA

3.1 Introduction

The strength of an economy may be measured by the value of its accumulated wealth (capital structures and equipments, land, monetary assets, net foreign assets) and the rate at which it grows throw savings and investment. The main determinants of money supply in Nigeria are foreign exchange assets, bank credit; quasi-money, that is short term debt instruments of public and private sectors. Consequently, another means of money supply was introduced into Nigerian banking industry. This means of money supply is profit and loss sharing banking, which is simply called non-interest banking.

It eliminates the barrier between those who save and those who invest, and bring them closer to the real market. The nature of the financial intermediation of non-interest bank significantly differs from the conventional banks and it is in harmony with real market and developmental changes in it. It deals with its customers on investment grounds rather than a pre-determined fixed interest rate. It invests the money of its depositors on profitable projects after going through a strategic analysis in order to give a substantial return to its depositors.

Non-interest bank is a financial organization engaged in financial intermediation between surplus and deficits in the economy. It denounces interest and such other un-Islamic dealings in its entire transaction as clearly prohibited in the Holy Quran.[167] Also, the organization encourages an interest free banking and trading.[168]

[167] Quran, Chapters 3:13 and 4:161
[168] Ibid, Chapter 2:275

3.2 Emergence of Non-interest Banking

From historical perspective, it was established that the first interest-free banking, by the name of Agibi Bank, was started by the Jews in Babylonia in 7000 B.C.[169] the basis adopted was mortgage of some productive assets like a house, a piece of land, a horse or a slave, which the borrower parted with and the bank hired out in exchange of a loan without interest. Similarly, it is evident that the term "bank" is not a new name in Islam. The equivalent which is "bait" al-mal (treasury) was established during the reign of the glorious caliphs to ensure effective management and accountability of public funds. More so, this noble institution commenced other monetary functions during the reign of the glorious caliphs, especially Umar Ibn Al-Kattab. Bail Al-mal performed certain banking functions, which still exist in the present modern banking operations. These include services such as depositing, withdrawing, cashing of cheques, changing and transfer of money. Thus, it is pertinent to note that all these financial services were rendered more especially to Islamic government than to the individuals.[170]

According to a muslim historian, Al-Yaqubi, cheque dates back to the time of Caliph Umar Ibn Al-Khattab who died in 897 A.D. He was the first to draw a cheque and put his stamp underneath and sign it.[171] More so, Al-Jahshiyari who died in 942 A.D. made a similar statement with regard to Harun Al-Rasheed.[172]

From that time onwards, the custom of using cheque by the people as a whole became quite similar. Centres of money exchange were established by muslim merchants in different parts

[169] Ahmed. S.M. (2010), *Towards Interest- Free Banking,* Adam Publishers & Distributers, New Delhi, p.14
[170] Saleh, A. (2003), *An Introduction to Islamic Economics and Banking System*, Gidan Dabini Publishers, Sabon
Titi Dandago, Kano, p. 119
[171] Ibid.
[172] Ibid.

of the muslim world and inherited this well established banking system, but they never engaged in the practice of "riba or interest".

When the muslim world is teleguided through world Financial Organizations such as World Trade Organization, World Bank and International Monetary Fund, the unhealthy developments of these organizations led to what agitated the minds of Muslims scholars to meet up the challenges of the Western economic ideologies. This is because the modern theories on banking are contrary to Islamic law and cannot alleviate but rather increase unsolvable economic crises. Notable among these scholars are Abdul Hassan Al-Nadwi and Abul Ala-Maududi from Pakistan and Hassan Al-Banna, Sayed Al-Qutub and Rashid Rida from Egypt.[173]

The earliest references to the reorganization of banking on the basis of profit sharing rather than interest are found in the writings of Anwar Qureshi[174], Naiem Siddiqi and Mahmud Ahmad in the late forties, which were followed by a more elaborate exposition by Maududi, in 1950, Muhammad Hamidullah in 1962.[175] They have all recognized the need for commercial banks and the evil of interest in that enterprise, and have proposed a banking system based on the concept of *Mudarabah*[176] - profit and loss sharing.

Early seventies saw the institutional involvement. Conference of Finance Ministers of the Islamic Countries held in Karachi in 1970, the Egyptian study in 1972, First International Conference on Islamic Economics in Mecca in 1976, International Economic Conference in London in 1977 were the result of such involvement. The involvement of institutions and

[173] Ibid., p.22
[174] http://www.islamicbanking.nl/chap4.html- (assessed on 3rd July, 2012).
[175] http:// Ibfn.wordpress.com- (assessed on 3rd July, 2012)
[176] The full definition and operation of *Mudarabah* has been discussed in Chapter Two.

governments led to the application of theory to practice and resulted in the establishment of the first non-interest bank. The Islamic Development Bank, an inter-governmental bank established in 1975, was born of this process.[177]

In most countries, the establishment of non-interest banking had been by private initiative and was confined to that bank. Thus, the first measure towards establishing the modern non-interest banking system, was in Cairo, Egypt. The Bank operated successfully yielding positive result in a small town called *Mit Ghamr,* with a population of about 40,000 people. The financial exploration was very successful and yielded fruitful result, with over a million customers. As a result, 20 branches were established to broaden its financial operation within four years of operation.[178]

Another remarkable event took place in 1977 in Kuwait due to the successful operation of non-interest banks and confidence voted by depositors, the government was motivated to establish the Kuwai Finance House. This bold attempt by Kuwait government has influenced some muslim countries to follow its footsteps towards establishing Islamic banks under the auspices of Islamic Development Bank. These countries include Sudan, Pakistan, Saudi Arabia and Jordan. Others are Iran, Malaysia, Iraq, Indonesia and Syria.[179]

In Iran and Pakistan, however, it was by government initiative and covered all banks in the country. The governments in both countries took steps in 1981 to introduce non-interest banking. In Pakistan, with effect from 1st January 1981, all domestic commercial banks were permitted to accept deposits on the basis of profit-and-loss sharing. New steps were

[177] http:// Ibfn.wordpress.com *Op. Cit.*
[178] Ibid.
[179] Ibid.

introduced on 1st January 1985 to formally transform the banking system over the next six months to one based on no interest. From 1st July 1985 no banks could accept any interest bearing deposits, and all existing deposits became subject to profit-and-loss sharing rules. Yet some operations were still allowed to continue on the old basis. In Iran, certain administrative steps were taken in February 1981 to eliminate interest from banking operations. Interest on all assets was replaced by a 4 percent maximum service charge and by a 4 to 8 percent 'profit' rate depending on the type of economic activity. Interest on deposits was also converted into a 'guaranteed minimum profit.' In August 1983, the Usury-free Banking Law was introduced and a fourteen-month change over period began in January 1984. The whole system was converted to a non-interest one in March 1985[180].

In the ten years since the establishment of the first private commercial bank in Dubai, more than 50 non-interest banks have come into being. Though nearly all of them are in Muslim countries, there are some in Western Europe as well: in Denmark, Luxembourg, France, Germany, Italy, Switzerland, Ireland and United Kingdom. Many banks were established in 1983 and 1984. The numbers have declined considerably in the following years.[181]

The subject matter of writings and conferences in the eighties have changed from the concepts and possibilities of non-interest banking to the evaluation of their performance and their impact on the rest of the economy and the world. Their very titles bear testimony to this and the places indicate the world-wide interest in the subject. The Conference on non-interest banking: its impact on world financial and commercial practices held in London in September 1984, the Workshop on Industrial Financing Activities of Islamic Banks held in

[180] Ibid.
[181] http://www.isdbcareers.com and Uaelaws.files.wordpress.com- (assessed on 4th July, 2012).

Vienna in June 1986, International Conference on Non-Interest Banking held in Tehran in June 1986, the International Conference on Non-Interest Banking and Finance: Current issues and future prospects held in Washington, D.C. in September 1986, the Non-Interest Banking Conference held in Geneva in October 1986, and the Conference 'Into the 1990's with Non-Interest Banking' held in London in 1988 belong to this category. One of the most recent one is the Workshop on the Elimination of *Riba* from the Economy held in Islamabad in April 1992.[182]

3.3 Non-Interest Banking in Nigeria

In order to meet the challenges facing Nigerian banking industry and provide option for financial investment, CBN developed a framework on non-interest banking and other financial institutions. As a result, a Circular No. FPR/DIR/CIR/GEN/01/017 on the Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria, date 21th June, 2011 and Guidelines on the Shariah Governance for Non-Interest Financial Institutions in Nigeria published on 21st July, 2011 for the regulation and supervision of Institutions offering non-interest financial services in Nigeria were issued by CBN.

Prior to the Circular of CBN, profit and loss sharing window banking was operated by the defunct Trade Bank Plc, but closed it thereafter. Similarly, the defunct Habib Nigeria Bank Limited commenced profit and loss sharing banking business in some designated branches of the bank in 1999. This was seen as a pilot scheme to test the market so that the bank would be able to determine whether to increase or decrease those branches offering profit and loss

[182]Ibid.

sharing services.[183] Stanbic IBTC Limited, also, has opened a window for non-interest banking services to its esteemed customers. This was done in accordance with the provisions of Banks and Other Financial Institutions Act.[184]

CBN issued the framework pursuant to Section 33 (1) (b) of the Central Bank of Nigeria Act, 2007 and Sections 23(1); 57(1)(2) and 61 of Banks and Other Financial Institutions Act.[185] The Framework is to be read together with the provisions of the Central Bank of Nigeria Act, 2007, Companies and Allied Matters Act,[186] and Circulars/Guidelines issued by CBN from time to time. All Non-Interest Financial Institutions are required to comply with the issued guidelines on non-interest financial institutions and any other guidelines that may be issued by CBN from time to time.

The Circular of CBN[187] defined a Non-Interest Financial Institutions to mean a Banks or Other Financial Institutions under the purview of the CBN, which transacts banking business, engages in trading, investment and commercial activities as well as the provision of financial products and services in accordance with the Shariah principles and rules of Islamic Commercial Jurisprudence.

The Circular further provides that transactions, instruments and contracts or financial services are non-permissible if they involve:

(i) Interest;

(ii) Uncertainty or ambiguity relating to the subject matter, terms or conditions;

(iii) Gambling;

[183] Oluyombo, O. (2004), *Non-Interest (Islamic) Banking*, Kings & Queen Associates, Oshodi, Lagos, p. 73.
[184] Cap. B3, Laws of the Federation of Nigeria, 2004.
[185] Ibid.
[186] Cap. C20, Laws of the Federation of Nigeria, 2004
[187] CBN Circular on Non-Interest Banking, Op. Cit.

(iv) Speculation;

(v) Unjust enrichment;

(vi) Exploitation/unfair trade practices;

(vii) Dealings in pork, alcohol, arms & ammunition, pornography and;

(viii) Other transactions, products, goods or services which are not compliant with the Shariah rules and principles.

The Circular and the Guidelines have provided procedures on how a conventional bank could get licence from CBN to open a branch or window through which it could render banking services free from interest and other financial services in accordance with the principles of Islamic Commercial Jurisprudence.[188] Similarly, opportunity was also given to Microfinance Banks to operate banking business in line with the Shariah.

3.4 Conventional Legal Regime of Non-Interest Banking

To achieve a sound financial system, Central Bank of Nigeria (CBN) is the regulatory body that is saddled with the responsibility for ensuring monetary and price stability and promotion of a sound financial system in Nigeria.[189] For the purpose of achieving this statutory objective, it is also saddled with responsibility of granting license for banking business in Nigeria and to make rules and regulations thereto. In this regard, no person shall commence banking in Nigeria unless he/she complies with the provision of section 2(1) of Banks and Other Financial Institution Act,[190] which provides that: "no person shall carry on

[188] Stanbic IBTC Limited opened a window for its customers that need financial services in line with laid down rules of Shariah in Nigeria.
[189] Section 2, Central Bank of Nigeria Act, 2007
[190] Cap. B3, Laws of the Federation of Nigeria, 2004

any banking business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid banking licence."

Pursuant to the above mentioned provision, any person that wants to carry on banking business in Nigeria must, first of all, comply with the provisions of Companies and Allied Matters Act[191] before applying for banking license to CBN. To achieve that, section 18 of the latter Act[192] provides that: "two or more person may form and incorporate a Company, whether private or public."

The section does not only contemplate a natural person, but also a body corporate or incorporate as those that are eligible to join in the formation of a company. The inclusion of artificial person in the eligibility for forming a company is given by section 18(1) of Interpretation Act, [193] where it provides that "person" includes a body of persons corporate or unincorporated.

To obtain licence for non-interest banking business, there must be a registered company with Corporate Affairs Commission. Therefore, it is understood that those who want to carry on non-interest banking business may, under the principle of Islamic Commercial Jurisprudence, come together under *Sharikatul-Inan* and register a company with Corporate Affairs Commission before obtaining banking licence from CBN.

However, the question is whether *Sharikatul-Inan* including an artificial person as one of the parties to the *Sharikah* is valid under the Shariah. For instance, where a corporate body subscribes to the shares of non-interest bank, which has legal recognition under the Nigerian

[191] Cap. C20, Laws of the Federation of Nigeria, 2004.
[192] Ibid.
[193] Cap. 192, Laws of the Federation of Nigeria, 2004.

laws, should "juridical person" under Nigerian law be recognized under the Shariah? To answer this nagging question, this Chapter would look at the concept of juridical person under the Shariah.

At the first instance, it should be understood that it is a group of natural persons that will agree to form a joint venture for the purpose of business enterprise under the umbrella of partnership. Those individuals would be responsible for the running of the business of the joint venture in accordance with the agreement they reached thereto. Where the business venture realizes profit, the profit is distributed to the members in accordance with the proportion of their contribution to the joint venture. Similarly, where the joint venture owes liability to third party, the liability would be shared among the members in accordance with their contribution.[194]

In a nutshell, whatever action is taken by the joint venture, it should be considered as the action of the individual members. That is reason why the law recognizes "lifting the veil of incorporation" where a corporate body owes debt to a creditor, in the event of winding up proceeding, or where the corporate body violates any provisions of the law.[195] The law may look beyond the veil of incorporation and hold the individual members liable for the debt.[196] Furthermore, if it appears that the business of the company has been carried on in a reckless manner or with the intent to defraud creditors or for any other fraudulent purpose, such persons that knowingly carried on the business may be liable to such contribution to the company in the course of winding up of the company.[197]

[194] Siddiqi, M.N. (1983) *Banking Without Interest,* The Islamic Foundation, Leicester, UK, p.39
[195] Sections 93, and 506, *Companies and Allied Matter Act, Op. Cit.*
[196] *Jones & Another vs. Lipman (1962) 1 All E.R. 442*
[197] Section 506, *Companies and Allied Matters Act, Op. Cit.*

In the light of the above, the company, though regarded in law as distinct from its members, represents the will and actions of its members in its dealings with third party. Therefore, it should be regarded as an icon that represents natural persons, with attributes of natural persons in terms of rights and obligations. Also, all its dealings are carried out by individuals that have contractual agreement with the company.

Taking into consideration the concept of "juridical nature" of *Waqf* and *Bait-al-Mal* in the Shariah, a registered company may form part of the parties that will establish and carry on business of non-interest banking in Nigeria because of the following reasons:

(i) *Waqf* is a legal and religious institution wherein a person dedicates some of his/her properties for religious or charitable purpose. The property, after being declared as *Waqf,* no longer remains in the ownership of the donor. The beneficiaries of a *Waqf* can benefit from the corpus or proceeds of the dedicated property. Its ownership vests in Allah (S.W.T.). It seems that Muslim jurists have treated the *Waqf* as a separate legal entity and ascribed to it some characteristics similar to those of a natural person. This will be clear from the following two rulings given by the *Fuqaha'* in respect of *Waqf.*

(a) If a property is purchased with the income of *Waqf,* the purchased property cannot become part of the *Waqf* automatically. The Jurists maintain that the property so purchased shall be treated as a property owned by the *Waqf.* That clearly shows that a *Waqf* can own a property, like a natural person.[198]

(b) The Jurists also maintain that the money given to the *Mosque* as donation does not form part of the *Waqf,* but it comes into the ownership of the *Mosque.* Here again

[198] Usmani., T.M. (2010), *An Introduction To Islamic Finance,* Qur'anic Studies Publishers, Karachi, p. 225,

the *Mosque* is accepted to be the owner of the money and capable of being the owner of something by some of Jurists of Maliki school. According them, the capability of the *Mosque* is constructive, like incorporated body, while the capability enjoyed by a human being is physical.[199]

It could be deduced from the foregoing that once the ownership of the *Waqf* or *Mosques* is established, it will logically follow that it can sell and purchase, may become a debtor or creditor and can sue and be sued. Thus, all the characteristics of a "juridical person' can be attributed to it.

(ii) *Baital-Mal* is an exchequer of an Islamic state where all citizens have some right in it, yet, nobody can claim to be its owner. *Baital-Mal* has some rights and obligations as maintained by Hanafi Jurist, Imam Al-Sarakhsi.[200] The state can borrow money from *Baital-Mal* for the purpose of paying salaries, when there is no money in Kharaj department of the *Baital-Mal.*

Flowing from the above, *Fuqaha'* has accepted the "juridical nature" of the *Baital-mal,* which can be described as a creditor or a debtor, and thus can sue and be sued in the same manner.[201]

(iii) Joint Stock is another example very close to the concept of "juridical person" in a joint stock company in the *Fiqh* of Imam Shafi'i. According to a settled principle of Shafi'i school, if more than one person run their business in partnership, where their assets are mixed with each other, *Zakka* will be levied on each of them individually, but it will be payable on their joint-stock as a whole, so that even if one of them does

[199] Ibid.
[200] Ibid.
[201] Ibid, p. 227

not own the amount of *nisab,* but the combined value of the total assets exceeds the prescribed limit of *nisab, Zakat* will be payable on the whole joint-stock including the person whose share is less than *nisab* thereby contributing to the levy in proportion to his ownership in the total assets. Though the person whose share is less than *Nisab* is not obliged to pay *Zakat* had it been it is levied on each person in his individual capacity, but his share is considered to be under obligation to pay *Zakat* in the join-stock. In this regard, the joint-stock is considered distinct from the persons that contributed to the partnership.[202]

In addition to the foregoing, the International Islamic Fiqh Academy of Organization of Islamic Conference, in its seventh Session held in May, 1992 adopted Resolution No. 7/1/63 in relation to corporation in the following manners:[203]

(a) The formation of *Musharakah Musahamah* having lawful objectives and activities is lawful;

(b) There is no disagreement about the prohibition of the shares of *Musharakah* whose primary objective is prohibited, like transaction in interest or which produces and deals in prohibited products;

(c) The rule of prohibition applies to shares of *Musharakah* that deal a ttimes in prohibited things like interest, even if their primary activity is permissible.

Notwithstanding the above analogical deduction, one of the recent scholars[204] is of the view that capacity for acquisition of a right cannot be assigned to a thing other than a living human

[202] Ibid.
[203] Hafeez, M.M. (2013), *An Analysis of Corporate Entity and Limited Liability in Islamic and Western Perspectives of Corporate Governance,* International Journal of Business, Economic and Law, Vol. 2, Issue 3
[204] Nyazee, I.A.K. (2000), *The Theory of Islamic Law*, Islamic Research Institute Press, Islamabad, p.77.

being, nor have earlier jurists ever acknowledged the existence of artificial person or capacity for anything non-human. In attempt to expound his position, he stated that jurists insist that in the offence of theft liable to punishment is operative where the property is owned by someone. The question arises as to mosque, or to the *bait al-mal,* whether punishment can be awarded in these cases. The mosque is considered to be property belonging to God, while the *bait al-mal* is joint property in which a theft is deemed to have a potential share. The theft punishment regarding the stolen property of juristic person does not meet the Shariah requirements for theft. Therefore, juristic person is not acknowledged by the Shariah. He further asserted that juristic person cannot perform religious duties hence it cannot be acknowledged under the Shariah.

However, the scholar[205] failed to take into cognizance the fact that the essence of juristic person is to carry out certain business activities, which, in its formation documents, does not contemplate commission of any crime capable of being punished under the Shariah. Also, all the activities of juristic person are being carried out through its agents, who are hired purposely for business transaction. If the agents go beyond the limit of their authority, they will be held responsible for their action. That is reason why CAMA allows lifting the veil of incorporation, where the directors of the company commit offence.[206]

I therefore stand to differ with the view of the scholar, especially in his attempt to invoke the performance of religious duty as a condition for acknowledging a juristic person under the Shariah. My reasons are based on the following Shariah position:

[205] Ibid.
[206] Section 325, Companies and Allied Matters Act, Op. Cit.

(i) A minor does not owe obligation to perform religious duty, but he has capacity to possess some rights and owe some obligations under contractual transaction. Juristic person, too, does not owe obligation to perform religious duty but can possess right and owe obligation under contractual transaction.

(ii) A minor can transact business through his guardian who stands in his place and represents him in a substitutory duty. Likewise, juristic person transacts business though its directors, agents and employs who can be described as its guardian.

(iii) A minor is liable for damage he caused to another's property. Also, the juristic person is liable to the damage caused to another's property in the course of carrying out its duty by its director, agent or employee.

(iv) A minor is liable for payment of *zakat*. The juristic person, too, is liable to pay *zakat* as it applies to joint venture in respective of whether the contribution of one of the members does not reach *nisab.*

In the light of the above, the juristic person can, from the juristic point of view, possess legal capacity to own property, sue and be sued under the Shariah. It can be bound for the business transaction it carries on through its director, agent or employee.

Flowing from the above, incorporated body could be a party to the formation of non-interest bank that would carry on banking business pursuant to the relevant rules and regulations of CBN. Therefore, it has indeed met the requirements of the Shariah principles and practice and Corporate Affairs Commission.

Having seen how non-interest bank could be incorporated under the Act,[207] does free interest banking operation have legal backing under the Nigerian legislation? To succinctly answer this question, regard must be heard to the relevant legislation governing banking activities in Nigeria. They are as follows:

(i) Every bank operating in Nigeria has been enjoined to display at its offices its lending and deposit interest rates, but profit and loss sharing bank is expressly exempted from displaying lending and deposit interest rates in its offices.[208]

(ii) Furthermore, section 66 of the Act[209] interpreted "profit and loss sharing bank" to mean a bank which transacts investment and commercial banking business and maintains profit and loss sharing accounts.

Deducing from the foregoing, profit and loss sharing bank is a bank that:

(i) provides entrepreneur with its capital on the basis of *profit sharing;*

(j) bears financial liability of the capital provided by the bank for investment business (except where there is negligence, recklessness or breach of any terms of the investment by the entrepreneur);

(k) operates profit sharing investment account for its customers on agreement that the account holder will bear the loss in the event that the loss is incurred, and

(l) it engages in commodity trading for the purpose of meeting its customers' demand and generating profit for its customers' that maintain profit investment account and shareholders

[207] Companies and Allied Matters Act, *Op. Cit.*
[208] Section 23(1) of Banks and Other Financial Institutions Act, *Op. Cit.*
[209] Ibid.

It suffices to understand from the above features that profit and loss sharing bank is non-interest bank as contemplated in the Act.[210] Therefore, profit and loss sharing bank is nothing but non-interest bank as legally permitted by Nigerian law.

3.5 Power of CBN to Grant Banking Licence for the Operation of Non-Interest Banking

Non-interest bank in Nigeria is subject to the regulatory powers of CBN, Corporate Affairs Commission and Securities and Exchange Commission. With subjection to these regulatory bodies, licence to operate banking business, irrespective of registration with Corporate Affairs Commission, must be obtained from relevant regulatory authority before commencement of operation. In this regard, CBN is the only body responsible for granting banking licence as provided for by section 3(1) of Banks and Other Financial Institutions Act.[211] It prescribed how the application for banking licence would be made to CBN. The application shall be accompanied by the following documents:

(i) A feasibility report for the proposed bank. In case of non-interest bank, the promoters shall, in addition to the feasibility report, provide evidence of a technical agreement executed by them with an established and reputable non-interest bank or financial institution. The agreement shall explicitly specify the role of the two parties and shall subsist for a period of not less than 3 years from the date of commencement of the operation;

(ii) A copy of the memorandum and articles of association of the proposed bank;

(iii) A list of the shareholders, directors and principal officers of the proposed bank and their particulars;

(iv) The prescribed application fee, and

[210] Ibid.
[211] Ibid.

(v) Such other information, documents and reports as CBN may, from time to time, specify.

Notwithstanding meeting all the regulatory requirements, the Governor of CBN is empowered to issue or refuse to issue the licence to the applicants without giving any reason for such refusal.[212]

The power of CBN to grant banking licence is in respect of banks as prescribed under section 66,[213] which includes commercial banks, *profit and loss sharing bank* and specialized banks. Therefore, issuing banking license for operation of non-interest bank in Nigeria by CBN is legal and the CBN Governor does not need to obtain Minister's approval as the provision of section 3(5) of the Act[214] has been repealed by Decree No. 38, 1998 thereby restoring the original provision of section 20 of the Banks and Other Financial Institutions Act, 1991.

Similarly, the declaration of Federal High Court, Abuja in the case of *Godwin Sunday Ogbaji v. Central Bank of Nigeria & others*[215] that granting banking licence by CBN to Jaiz Bank Plc to operate non-interest banking in accordance with the principles of Islamic Commercial Jurisprudence as illegal is totally an error in law. This is because CBN enjoys autonomous power under the Act and the Court did not recognize the autonomy of CBN as conferred on it by Decree No. 38 of 1998.[216] The Governor of CBN does not require the consent of Minister of Finance before granting banking licence to any applicants. That is reason why the CBN

[212] Section 3(3), Ibid.
[213] Ibid.
[214] Ibid.
[215] Suit No. FCH/ABJ/CS/710/2011, (unreported)
[216] Ibid.

Act saddled the President with responsibility of appointing CBN Governor subject to confirmation by the Senate.[217]

Considering the enabling laws for the granting of banking licence for non-interest banking, it will suffice to understand that non-interest banking is legally introduced and adopted into Nigerian banking system. What remains is to provide regulatory and supervisory synergy with a view to avoiding conflict with existing legislation while regulating the activities of non-interest bank by CBN.

[217] Section 8, Central Bank of Nigeria Act, 2007.

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE POWER OF THE GOVERNOR OF CENTRAL BANK OF NIGERIA VIS-A-VIS NON-INTEREST BANKING UNDER THE PRINCIPLES OF ISLAMIC COMMERCIAL JURISPRUDENCE

4.1 Introduction

Given the increasing number of requests from individuals, banks and other financial institutions desiring to offer the Shariah compliant banking products and services in Nigeria, Central Bank of Nigeria (CBN) developed a framework on non-interest banking and other financial services. As a result, CBN Circular No. FPR/DIR/CIR/GEN/01/017 on the Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria, date 21st June, 2011 was released. Subsequently, CBN Guidelines on Shariah Governance for Non-Interest Financial Institutions in Nigeria dated 21st July, 2011 was also released.

Prior to the Circular of CBN, profit and loss sharing window banking was operated by the defunct Trade Bank Plc, but closed it thereafter. Similarly, the defunct Habib Nigeria Bank Limited commenced profit and loss sharing banking business in some designated branches of the bank in 1999. This was seen as a pilot scheme to test the market so that the bank would be able to determine whether to increase or decrease those branches offering profit and loss sharing services.[218] Stanbic IBTC Limited, also, has opened a window for non-interest

[218] Oluyombo, O. (2004), *Non-Interest (Islamic) Banking*, Kings & Queen Associates, Oshodi, Lagos, p. 73.

banking services to its esteemed customers. This was done in accordance with the provisions of Banks and Other Financial Institutions Act.[219]

The Circular and Guidelines have provided procedures on how a conventional bank could get licence from CBN to open a branch or window through which it could render banking services free from interest and other financial services in accordance with the Principles of Islamic Commercial Jurisprudence.[220] Similarly, opportunity was also given to Microfinance Banks to operate banking business in line with the Shariah Principles and Practice.

The Circular of CBN[221] defined a Non-Interest Financial Institutions to mean Banks or Other Financial Institution under the purview of the CBN, which transacts banking business, engages in trading, investment and commercial activities as well as the provision of financial products and services in accordance with the Shariah principles and rules of Islamic Commercial Jurisprudence.

Consequent to the release of the Circular and Guidelines by CBN, Ja'iz Bank Plc started operation on 16th January, 2012 with three branches in Abuja, Kaduna and Kano.[222] Despite the stiff competition in the industry, it currently has seventeen branches spread in strategic locations in the Northern part of Nigeria in which it renders financial services in accordance with the Shariah and laid down rules and guideline set by CBN.[223] Also, it has grown to such

[219] Cap. B3, Laws of the Federation of Nigeria, 2004.
[220] Stanbic IBTC Limited opened a window for its customers that need financial services in line with laid down rules of Shariah in Nigeria.
[221] CBN Circular on Non-Interest Banking, Op. Cit.
[222] "First Non-interest Bank Commenced Operation." In: *The Vanguard*, Saturday, 27th April, 2012, p.14
[223] Jaiz Bank Plc 2014 Annual Report & Accounts, Presented on the 3rd Annual General Meeting at NAF Conference Centre & Suites Plot 496 Ahmadu Bello Way, Kado, Abuja, FCT, on Wednesday, 10th June, 2015, at page 3.

a level that it has to apply for national licence to enable it operate in other locations of the country, such Lagos, Port Harcourt and Ibadan.

4.2 Power of the Governor of Central Bank of Nigeria to Make Rules and Regulation

The Nigerian Constitution saddled the state with responsibility to come up with policy that will boost and strengthen the economy as provided for by section 16(2)(a) of 1999 Constitution that "the state shall direct its policy towards ensuring the promotion of a planned and balanced economic development of Nigeria." In order to achieve this constitutional motive of economic development, CBN is saddled with responsibility for ensuring monetary and price stability and promotion of a sound financial system in Nigeria. This is enshrined under section 2 of Central Bank of Nigeria Act, 2007. To discharge this statutory responsibility, the Governor of CBN is empowered to regulate the activities of financial institutions in Nigeria as well as making him/her the Chief Finance Officer and financial adviser to the nation.

Indeed, the law has vested the Governor of CBN to make rules and regulations as regards to the operation and activities of all banks and financial institution operating in Nigeria. Thus, section 57(1) of the Act[224] provides that: "the Governor may make regulations, published in the Federal Gazzette, to give full effect to the object and objective of this Act." Similarly, subsection (2) of section 57[225] further provides that: "the Governor of CBN may make rules and regulations for the operation and control of all institutions under the supervision of CBN."

[224] Banks and Other Financial Institutions Act, Op. Cit.
[225] Ibid.

Having regard to the foregoing, the CBN Governor has an exclusive power to make rules and regulation relating to the financial activities of all banks and financial institutions in Nigeria. However, the rules and regulation should not in any way contravene or be in conflict with the provision(s) of existing laws. For instance, the Circular of CBN on non interest bank and financial institution states that any bank or institution that wants to operate non-interest banking shall state in its Memorandum and Articles of Association that it will carry on banking business in accordance with the "Principles of Islamic Commercial Jurisprudence." The nagging questions here are:

(i) does the CBN Governor have power to issue guidelines on how Memorandum and Articles of Association (MEMART) of corporate body duly registered under Companies and Allied Matters Act (CAC)[226] should be?

(ii) does CAMA[227] contemplate carrying on business by corporate institution in accordance with the Principles of Islamic Commercial Jurisprudence?

(iii) which regulatory body has power to issue guidelines relating to the incorporation of a company and the documents to be filed with CAC?

Answer to these could simply be given in the following:

(a) the Governor of CBN has power to make rules and regulation for the operation and control of institutions that are under the supervision of CBN.[228] The power envisaged under the Act is explicit to the extent that the Governor can give directives as to way and

[226] Cap. C20, Laws of the Federation of Nigeria, 2004
[227] Ibid.
[228] Section 57, Banks and Other Financial Institution Act. Op. Cit.

manner the banking business and financial services should be is in order to promote sound financial system and maintain adequate and standard banking system that can meet the demand and service the general public. Also, the rules and regulation must be for the purpose of ensuring good corporate governance and management in the banking and financial system. The Act also empowered the Governor of CBN to issue directive on cash reserves, supervision and examination of institutions under the control of CBN. All these are geared towards ensuring that the nation economy is part of the global change, and which is strong, competitive and reliable. Provide a banking system which depositors can trust, and investors can rely upon. Notwithstanding all these powers conferred on the Governor of CBN. Section 2 of the Act provides that "no person shall carry on any banking business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid banking licence issued under this Act."[229] The Act first recognizes the function of CAC by making it compulsory for any person that wants to carry on banking business in Nigeria to, first of all, be registered CAC. The mention of a duly incorporated company shows that CAC has a statutory role to play in banking business. This is because no person shall be given a banking licence except CAC issued the person with incorporation Certificate. On this account, the Governor of CBN has no power to issue guidelines on how MEMART of corporate body duly registered under CAMA.

(b) CAMA is considered as a capital piece of Legislation for incorporation of companies in Nigeria. It encompasses administrative regulations and substantive principles to achieve a considerable codification of Nigerian Company Law. Therefore, all incorporate bodies that carry on business in Nigeria must be registered under the Act before commencement

[229] Ibid.

of their business. However, Act does not contemplate carrying on commercial and investment activities, which is part of the businesses of non-interest bank, in accordance with the Principles of Islamic Commercial Jurisprudence. In this regard, the Circular of CBN on non-interest financial institutions requesting non-interest bank to state in its MEMART that it will carry on banking business in accordance with the Principles of Islamic Commercial Jurisprudence goes beyond the CBN Governor's power; and that may amount to encroachment into the regulatory power of another regulatory body, i.e. CAC. To vindicate this position, the Governor of CBN is not a member of CAC as provided for by section 2 of the Act.[230]

(c) The most striking statutory power of CAC under the CAMA is that all companies operating in Nigeria are subject to its administrative power irrespective of the nature of business they carry on, be it insurance, maritime, aviation, communication, manufacturing, or construction company. CAC is vested with power to administer the Act including the regulation and supervision of the formation, incorporation, registration, management and winding up of companies under or pursuant to the provisions of CAMA.[231] Its power includes the power to investigate the affairs of companies, pursuant to which it exercises quasi legislative power.[232] It also has the power to strike off the name of a company from its register.[233] In view of the foregoing CAC is conferred with enormous power to supervise the activities of all incorporated bodies in Nigeria. It is accordingly, vested with power to regulate the documents required, including their

[230] Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004, Op. Cit.
[231] Section 7(1)(a), Ibid.
[232] Section 315(1), CAMA; *Adebona v. Amao (1965) 4 N.S.C.C. 297.*
[233] Section 525, Ibid.

contents, for the incorporation of companies in Nigeria. Therefore, the regulation as to the contents of MEMAT of non-interest bank lies with CAC.

Deducing from the above, it would be understood that the Governor of CBN has gone beyond his statutory power by attempting to make regulation or issue circular on issues that are purely under the supervisory and regulatory power of CAC.

With regard to the carrying on business of non-interest bank pursuant to the provisions of Banks and Other Financial Institutions Act,[234] section 66 defined non-interest bank as "profit and loss sharing bank to mean "a bank which transacts investment or commercial banking business and maintains profit and loss sharing accounts." However, the business products of this bank are derived from Islamic Commercial Jurisprudence. How legal those products are under the existing legal framework in Nigeria?

Answer to this question must be found within the same provision that interpreted banking business to include "such other business the Governor of CBN may, by order published in the Gazette, designate as banking business." In the light of this provision, products that are derived from the Principles of Islamic Commercial Jurisprudence as contained in the Circular of CBN on non-interest financial institutions may form part of banking business that are legally recognized by Nigeria law, in so far as they are designated as banking business by CBN Governor. These products include *Murabahah, Mudharabah, Musharaka, Ijara, Wakala, Sukuk, Istisna'I and Salam.* However, the products of non-interest banking operation are different from mechanism for utilizing them for the purpose of generating profit for both

[234] Cap. B3, Laws of the Federation of Nigeria, 2004, Op. Cit.

shareholders and the customers. Therefore, what are the mechanisms for using the products designated by CBN governor for operation of non-interest bank?

These products are governed by the Shariah principles and practice, which constitute the mechanisms for utilizing the products of Islamic Commercial Jurisprudence. Are the mechanisms covered under the Act?[235]

To answer this question we must look at the relevant CBN power under the law creating it. CBN is empowered, by virtue of section 33(1)(b) of CBN Act, 2007, to issue guidelines to any person and any institution under its supervision. Pursuant to this provision, the Governor of CBN can give directive on how the banking activities should be carried on by any person or any institution under its supervision in Nigeria. Accordingly, it has the power to import or pronounce the Principles of Islamic Commercial Jurisprudence as procedure and guiding principle for the operation of non-interest bank and financial institutions that are desirous of rendering banking and financial services to the public in Nigeria on the basis on profit and loss sharing banking. On this note, CBN Guidelines on the Shariah Governance for Non-Interest Financial Institutions is therefore valid and, indeed, in accordance with the existing legal framework.

Furthermore, section 61 of Banks and Other Institutions Act[236] empowers CBN to supervise and regulate the activities of "other banks and special banks." Within the meaning of this provision, non-interest bank can fall under "*other banks"* since it has its separate interpretation to mean, under section 66 of the Act,[237] "the bank which transacts investment

[235] Ibid.
[236] Ibid.
[237] Ibid.

and commercial banking maintains profit and loss sharing accounts." To determine how this power could be exercised on non-interest bank, resort must be made to the practice of non-interest bank in other jurisdiction, like Malaysia. In this regard, the Governor of CBN is empowered to import the Shariah Principles and Practice and designate same as mechanisms for the operation of non-interest bank. This could be done and achieve by exercising the power conferred on him under section 66 of the Act while interpreting "*banking business."*[238] To this extent, the CBN Circular permitting non-interest bank to carry on its banking operation in accordance with the Principles of Islamic Commercial Jurisprudence is within the confine of the Law as discussed above.

4.3. Supervisory Bodies over the Activities of Non-Interest Bank

The full pledged non-interest bank in Nigeria, Jaiz Bank Plc, has the following features:

(i) It is duly incorporated under CAMA[239] as a public liability company;

(ii) It invited general public to subscribe to its shares;

(iii) It carries on commercial and investment business and maintains profit and loss sharing account.

Having the above mentioned feature, non-interest bank shall be subject to three different supervisory bodies, thus: CAC, Securities and Exchange Commission (SEC) and CBN. Though the foundation for rendition of banking and financial services in Nigeria was developed by CBN, but some of the activities of non-interest bank are subject to supervisory and regulatory power of CAC and SEC. How could this three Regulatory Bodies exercise

[238] Ibid.
[239] Cap. C20, Laws of the Federal Republic of Nigeria, 2004, *Op. Cit.*

their supervisory and regulatory power over non-interest bank seemingly without overlapping into the jurisdiction of the other Regulatory Body? To answer this question, the following has to be considered:

(a) Non-interest bank must publish and file its financial statement with CAC at the end of every financial year. Similarly, it is required to file returns with CAC as provided for by section 371 of CAMA.[240] These returns include documents relating to annual general meeting and changes of directors on the board as prescribed by the provisions of CAMA. On this account, CAC has a direct supervisory and regulatory power over the affairs of non-interest bank. Therefore, the latter is subject to the supervisory and regulatory power of the former.

(b) Non-interest is under obligation to render returns to SEC on profit focus and management of account on quarterly basis. Similarly, where there is material changes in the shareholding or on the Board of non-interest bank, such changes must be filed with SEC as provided for by section 13of Investments and Securities Act, 2007. In addition to this, SEC came up with a framework on *Sukuk* (Islamic Financial Certificate) due to its statutory power for registration of securities to be offered for subscription or sale to the public.[241] This *Sukuk* is one of the products of non-interest bank's operation. All dealings relating to issuance of *Sukuk* by non-interest bank or financial institution, are regulated by SEC. Sequel to that, non-interest bank is indeed subject to supervisory and regulatory power of SEC.

[240] Cap. C20, Laws of the Federation of Nigeria, 2004, Ibid.
[241] Section 13, Ibid.

(c) Being a corporate institution that transacts commercial and investment business and maintained profit and loss sharing account, non-interest bank is subject to CBN regulatory and supervisory power as the provisions of Banks and Other Financial Institutions Act[242] apply to it. Owing to this, it is obligated to comply with CBN rules and regulations relating to its activities as well as rendition of periodic reports. Therefore, the regulatory and supervisory power of CBN over non-interest bank is quite derived from statute as highlighted hereinbefore.[243]

Though CBN is charged with the overall control and administration of the monetary and banking policies of the nation, but such power must be exercised within the provisions of the law. Also, the power to issue guidelines to any person or any institution that engages in the provision of financial services shall be exercised strictly for the purpose of maintaining monetary and price stability and promotion of sound financial system in Nigeria. In practice, the rules and regulations to be issued by CBN Governor are for supervising banks' affairs and also scrutinizing their affairs in order to ascertain the financial standing of the banks and to ensure that the provisions of the law, its directives and Prudential Guidelines are complied with.

[242] Cap. B3, Laws of the Federal Republic of Nigeria, 2004, Op. Cit.
[243] Section 61, Ibid.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

Non-interest bank is a non-conventional financial institution that mobilizes financial resources into a profitable portfolio in an attempt to achieve pre-determined social and financial growth in line with the Principles of Islamic Commercial Jurisprudence.

Banks and other financial institutions all over the world act only as intermediary agents by mobilizing full funds and resources from the surplus segments of the market and channeling/allocating same to the deficit or demand sectors of the economy. Furthermore, the industry is the enabling hub of national and global payment system by facilitating trade transactions within and amongst numerous national, regional and international economic units, and by so doing, it enhances commerce, industry and exchange.

There is no doubt that a sound economic system could only be achieved if there is effective legal framework that efficiently spelt out the modus operandi of each and every unit of economic activities with a view to providing conducive environment for all to participate in the economic thrives. Effective legal framework is a *sine qua-non* for the industrial take-off, transformation and the eventual economic prosperity.

However, the legal framework of the financial institution does not contain a panacea to the emerging challenges that face the industry, which obviously posed a threat to the depositors' funds and those that want to carry on banking business in Nigeria.

It is undeniable fact that banking system is a media that plays role in spreading wealth amongst the individual members of the society by providing capital to those who could

generate and provide employment and services to the society. It also assists government in discharging its responsibilities to the people through execution of projects and settlement of workers' due. The Circular of the Central Bank of Nigeria (CBN)[244] on non-interest bank is, of course, welcome development in the banking industry, so that Nigerian economic will give room to all type of economic activities to contribute in the sphere of individuals' wealth acquisition and creation of jobs.

The operation of non-interest banks and financial institutions in Nigeria is a distributive justice that is founded under the Principles of Islamic Commercial Jurisprudence. Therefore, non-interest banks and financial institutions, in the next few decades, will certainly give a giant contribution towards the nation economy. However, this could be achieved with the support of government and relevant stakeholders by making sufficient and effective rules and regulations relating to the operation of non-interest banks and financial institutions that would be in consonance with the principles of the Shariah.

Similarly, the success of non-interest banks and financial institutions also defends on the people they deal with in terms of their honesty and sincerity. This is because, all business transactions could only be successful if the parties involved are sincere to each other. As such, no people of any belief condone insincerity in any dealings. Therefore, the trustworthiness is a key to the success of non-interest banks and financial institutions in Nigeria.

To achieve the desired objectives of non-interest banking business, CBN mandated every non-interest bank and financial institution to establish a Shariah Advisory Committee (SAC),

[244] CBN Guidelines on Shariah Governance for Non-Interest Financial Institution in Nigeria, dated 31st December, 2010

which shall operate independently from the management and board of the non-interest bank or financial institution.[245] Unlike conventional banks, the essence of establishment of SAC in non-interest bank is to ensure good corporate governance.

Membership of the SAC is accorded to individuals that have an academic qualification or possess necessary knowledge, expertise or experience in the sciences of the Shariah with particular specialization in the field of Islamic Transactions/Commercial Jurisprudence (Fiqh al Mu'amalat). With this requisition, the activities of non-interest bank shall, without any iota of doubt, be carried out with transparency, honesty and best practices in accordance with the principles of Islamic Commercial Jurisprudence.[246]

In the same vein, non-interest banks and financial institutions would certainly enjoy a sound regulatory supervision that would safeguard the shareholders' funds and depositors' money from abuses by the employees of the institutions.

5.2 Findings

Notwithstanding the giant effort of CBN in coming up with a legal framework for the establishment of non-interest banks and financial institutions in Nigeria, this work discovered that there are some issues that may hinder and/or affect a smooth operation of non-interest banks and financial institutions in Nigeria. These could be discerned from the following findings:

(i) Lack of express provision within Banks and Other Financial Institutions Act[247] and Central Bank of Nigeria Act, 2007 permitting the operation of non-interest banking in

[245] Ibid.
[246] Ibid.
[247] Cap. B3, Laws of the Federal Republic of Nigeria, 2004

recognition to Islamic commercial products, such as *Mudarabah, Musharakah and Istisna.*

(ii) Encroachment by CBN Governor into CAC's regulatory and supervisory power while making rules and regulations affecting the contents of Memorandum and Articles of Association of non-interest finance institutions.

(iii) Absence of synergy between regulatory bodies, such as CBN, CAC and SEC, to make rules and regulations for the effective operation of non-interest banking.

(iv) There is no specific law that may be applicable to dispute that may arise in relation to the non-interest banking operation, because English law still applies to dispute arising to non-interest banking operation, while the operation is conducted in accordance with the principles of Islamic Commercial Jurisprudence.

(v) Lack of public awareness on the products of the firat full pledged non-interest bank, Ja'iz Bank Plc, which affects its patronage by the general public.

To adequately elucidate the above findings, this work looked at each of them as follows:

i. Lack of express provision within Banks and Other Financial Institutions Act[248] and Central Bank of Nigeria Act, 2007 permitting the operation of non-interest banking in recognition to Islamic commercial products, such as *Mudarabah, Musharakah and Istisna.*

Notwithstanding the conventional legal regime of non-interest banking business in Nigeria, it is observed that there is no express legislation that allows banking business to be carried on

[248] Cap. B3, Laws of the Federal Republic of Nigeria, 2004

in accordance with the Principles of Islamic Commercial Jurisprudence. In all the enabling laws to the subject, there is no provision that allows financial institutions to venture into commodity trading or form part of a partnership for business venture. It is as a result of that, Godwin Sunday Ogbaji sued Central Bank of Nigeria, the Governor of Central Bank of Nigeria and Attorney General of the Federal before Federal High Court, Abuja challenging the action of CBN for granting banking licence to Jaiz Bank Plc to operate non-interest banking in accordance with the Principles of Islamic Commercial Jurisprudence and further asked the court to declare the licence of Jaiz Bank Plc to operate non-interest banking in accordance with the Principles of Islamic Commercial Jurisprudence illegal, null and void.[249] The Learned Justice, Justice Gabriel Kolawole, stated in his dictum that the licence issued to Jaiz Bank Plc by CBN to embark on Islamic Banking in the country would have been nullified if the plaintiff in the matter, Godwin Sunday Ogbaji, had *locus standi* to institute the action. He further declared that "there are no provisions in the Central Bank of Nigeria Act, 2007 and the Banks and Other Financial Institutions Act[250] that empower CBN Governor to issue licence or non-interest financial institution to operate under the Principles of Islamic Commercial Jurisprudence without the approval of the Head of State through the Minister of Finance."

The dictum of the learned Justice had, though the suit was struck out, raised concern on the safety of the depositors' funds in non-interest financial institution that operate under the Principles of Islamic Commercial Jurisprudence in Nigeria. Therefore, the operation of non-

[249] *Godwin Sunday Ogbaji v Central Bank of Nigeria & Others*, Suit No. FCH/ABJ/CS/710/2011, (unreported).
[250] Cap. B3, Laws of the Federation of Nigeria, 2004.

interest banking under the Principles of Islamic Commercial Jurisprudence is not expressly provided for under Nigerian legislation.

(ii) Encroachment by CBN Governor into CAC's regulatory and supervisory power while making rules and regulations affecting the contents of Memorandum and Articles of Association of non-interest finance institutions.

It is observed from the discussion in the preceding chapter that the Governor of CBN had encroached into regulatory and supervisory power of CAC by making a rule that non-interest financial institution shall state in its Memorandum and Articles of Association (MEMART) that it will carry on its business in accordance with the Principles of Islamic Commercial Jurisprudence. The power to regulate on documents for all corporate bodies carrying on business in Nigeria lies with CAC. To vindicate this position, the provision of Banks and Other Financial Institutions Act[251] recognized the statutory power of CAC in terms of registration of corporate institutions whereby it provides that "no person shall carry on banking business in Nigeria except if it is a company duly incorporated in Nigeria.[252]

In the light of that provision, banking business cannot be carried on by any person except CAC issued an incorporation certificate to that person. It could be argued that since the company is to carry on banking business, the Governor of CBN may have a certain power to make rule relating to the incorporation documents of a company that wants to carry on banking business. However, no matter how the argument might be canvassed it will not hold water, because the law establishing CAC did not in any way envisage the Governor of CBN

[251] Cap. B3, Laws of the Federation of Nigeria, 2004.
[252] Ibid.

as a member of CAC. Therefore, the incorporation documents are to be determined by CAC as provided for by section 7 of Companies and Allied Matters Act.[253]

(iii) Absence of synergy between regulatory bodies, such as CBN, CAC and SEC, to make rules and regulations for the effective operation of non-interest banking.

Flowing from the foregoing, it is observed that there is no synergy between CBN, CAC and Securities and Exchange Commission (SEC) in coming up with products of non-interest financial institutions under the existing legal framework. This is apparent from the action of CBN Governor where he inadvertently made rule on the area that is outside his jurisdiction. Before making such rule there was need to have a committee that will comprise staff of CAC, CBN and SEC which will look at the areas of each regulatory body's jurisdiction and come up with a direction in such a way that each regulatory body can exercise its supervisory and regulatory power within the confine of the law creating it, without exceeding its limit. However, the absence of such committee had led the CBN Governor to go beyond his power, and that shows the lack of synergy between the regulatory bodies, which in the end, might affect the operation of non-interest financial institutions in Nigeria.

(vi) There is no specific law that may be applicable to dispute that may arise in relation to the non-interest banking operation, because English law still applies to dispute arising to non-interest banking operation, while the operation is conducted in accordance with the principles of Islamic Commercial Jurisprudence.

[253] Cap. C20, Laws of the Federation of Nigeria, 2004.

It is a natural phenomenon that in every contractual relationship, dispute and disagreement between the parties may arise. Where the parties to contract could not resolve their disagreement amicably, resort must be made to proper court of law for the resolution of the dispute. This applies to all contractual relationship between the contracting parties, for example, tenancy agreement, hire purchase agreement, and so on. Non-interest bank is not equally exonerated from experiencing such disagreement with its customers.

When such dispute arises, which court assumes jurisdiction to adjudicate over the matter?

By virtue of section 272(1) of 1999 Constitution, State High Court is vested with jurisdiction to hear and determine any civil proceeding in which the existence or extent of a legal right, power, duty, liability, privilege, interest or obligation or claim is in issue. Pursuant to the foregoing, State High Court assumes jurisdiction to entertain matters between non-interest bank and its customers due to the following reasons:

(a) Non-interest bank itself is a body corporate duly registered under Companies and Allied Matters Act.[254] Also, it is a body corporate that is licensed by government institution to carry on banking business, i.e. CBN, in accordance with the principles of Islamic Commercial Jurisprudence.

(b) Non-interest bank can transact business with both natural and juridical person in the course of carrying out its banking business. Therefore, the court of first instance to entertain matters relating to non-interest banking should be State High Court.[255]

[254] Cap. C20, Laws of the Federation of Nigeria, 2004
[255] See the case of *Maina Gambo v Hajja Kyariran*, Suit No. JD/39A/1962 (Unreported)

(c) Being a court of unlimited jurisdiction except as may be excluded by the Constitution, State High Court should, in adjudicating matter relating to non-interest bank, apply Shariah law as the transaction between the parties was consummated in accordance with the Shariah principles.[256] Also, the judge that would adjudicate over a matter relating to non-interest bank should be versed in Shariah law and capable to make independent research and interpretation of the Quran and the Sunnah or at least possess the capacity to interpret what an exponent of Islamic law has interpreted on the basis of the Quran and Sunnah.

(v) Lack of public awareness on the products of the firat full pledged non-interest bank, Ja'iz Bank Plc, which affects its patronage by the general public.

From the interview with the management of Jaiz Bank Plc and questionnaires filled by some of persons that maintained business relationship with it, it is established that majority of the public (including persons that maintained accounts with Jaiz Bank Plc) are not aware of the products of non-interest banking system. Most of them believe that non-interest bank is all about keeping your money without adding any interest to it or borrowing money without paying interest for the use of the money. They are not aware of the project financing by non-interest bank, lease, investment account (profit and loss sharing account.

This lack of awareness is in fact affecting the growth of Jaiz Bank Plc in terms of business activities and profit generation for its customers and shareholders. Also, this will undoubtedly have impact on the objective of non-interest banking system in Nigeria.

The foregoing summarizes the bulk of the findings made in this work. As evident hereto, there are lacuna in the legal framework of non-interest banking business in Nigeria. It is therefore intended to proffer suggestions and recommendations below.

5.3 Recommendations

[256] *Alkamawa v Bello* (1998) 6 S.C.N.J. 127.

It could be understood from the forgoing that despite the latitude of legal framework that served as bedrock for CBN to issue Circular for the operation of non-interest financial institutions in Nigeria,[257] still CBN does not have unrestricted power in discharging its responsibilities under the provisions of Banks and Other Financial Institutions Act,[258] particularly on non-interest banking under the Principles of Islamic Commercial Jurisprudence. In order to allow CBN to discharge its responsibilities like other statutory regulators, the following recommendations are proffered:

(a) Though there are provisions in the Act that allow banking business on the basis of profit and loss sharing,[259] but, there is need to have an independent legislation that would serve as a bedrock for the operation of non-interest banking under the Principles of Islamic Commercial Jurisprudence in Nigeria. With such legislation in place, financial industry would be very dynamic and that would additionally strengthen our economy. This is what was done in Malaysia where Islamic Banking Act, 1983 (Act 276 Laws of Malaysia) was enacted to provide for the licensing and regulation of non-interest banking business. Something similar to that could be passed in Nigeria to provide for the licensing and regulation of non-interest banking business.

(b) Upon the release of CBN Circular and Guideline on institutions that are offering non-interest financial services in Nigeria, SEC came up with regulations on some products of the non-interest financial institutions, like *Sukuk,* in order to regulate the area that affect issuance of securities and investments in accordance with the Shariah principles and

[257] CBN Circular, Op. Cit.
[258] Cap. B3, Laws of the Federation of Nigeria, 2004. Op. Cit.
[259] Section 23(1), Banks and Other Financial Institutions Act, Op. Cit.

practice. Similarly, Nigerian Deposit Insurance Corporation is coming up with a framework on non-interest bank in order to provide insurance for the investments of the depositors and customers in non-interest bank. The insurance cover will be in accordance with the Shariah principles and practice. To this extent, there is need on the part of CAC to come up with a framework for the registration of institutions that offer non-interest financial services in Nigeria. The law establishing CAC has given it a wide range of regulatory and supervisory power over all incorporated bodies in Nigeria. Therefore, CAC should not be left behind in coming up with a framework for incorporation of companies that will carry on banking business and financial services in accordance with the Principles of Islamic Commercial Jurisprudence.

(c) To avoid the rigours of litigation in courts, another alternative way of resolving dispute between non-interest bank and its customers should be by using a forum of Alternative Dispute Resolution. Undoubtedly, this would allow the dispute to be arbitrated by well erudite scholars in Islamic Commercial Jurisprudence. Since non-interest bank would have risk control department that would be saddled with the preparation and documentation of agreements between the bank and its customers, the department should, with the approval of Shariah Advisory Committee, insert a clause in the agreement stating that where a dispute arises between the parties, such dispute should be referred to Alternative Dispute Resolution, which shall constitute two or more Arbitrators well versed in Islamic Commercial Jurisprudence. The dispute resolution should be conducted in accordance with Arbitration and Conciliation Act.[260]

[260] Cap. A18, Laws of the Federation of Nigeria, 2004

(d) With the inauguration of the Shariah Advisory Council by CBN for the purpose of regulating the activities of non-interest financial institutions in Nigeria, it is recommended that the same Council should be established by SEC and CAC for the purpose of supervising and regulating the activities of non-interest financial institutions. The Councils of CBN, SEC and CAC should be meeting periodically and discuss on the areas that need rules in order to create synergy between the relevant regulatory bodies. With this in place, the regulation that may be made by any regulatory body on non-interest financial institutions will amount to encroachment into the jurisdiction of the other regulatory body.

(e) It order to achieve the objective of non-interest banking in Nigeria, which includes eradication of poverty and job creation, there is need from the part of the first full pledge non-interest bank, Jaiz Bank Plc, to embark on public awareness on the products and services being rendered by it. By so doing, a lot of people that do not know the purpose of establishing non-interest banking system in Nigeria will understand and approach the bank with a view to investing their money without application of a predetermined fixed interest rate. And that will boost the balance sheet of the bank as well as its investment activities.

Pursuant to the above, non-interest financial institutions generally in Nigeria would continue to face hobbling, unlike conventional banks, unless proper steps are taking towards ameliorating the above highlighted challenges.

5.4 Concluding Remarks

Generally, it could be deduced from this work that non-interest banking practice embraces all persons in the sphere of the economic growth and wealth distribution without social discrimination as regard to the provision of collateral before you access funds for meeting personal demands or business activities. It also brings together those that save and those that invest on investment arrangement. This could be gleaned from the fact that Jaiz Bank Plc had grown 300% in terms of network and business growth from the date of its operation. This success is certainly achieved as a result of operating its banking business in accordance with the Shariah principles.

Notwithstanding the recorded success of Jaiz Bank Plc, the area of operating banking business in accordance with the Shariah principles and practice needs to have a burly legal framework so that the shareholders' funds and depositors' money could be safeguarded against any foreseeable legal risk.

BIBLIOGRAPHY

A. BOOKS

Ahmad, Z., *et al*. (1983), Money and Banking in Islam, Pap-Board Printers Limited, Rawalpindi Cantt.

Al-Muwatta Ibn Malik, Translated by Rizq Waheed Siddiqi, (2011), Dar- Almanarah, Egypt.

Asabia, O.S. (1992), Essay In Money And Banking, Fountain Publications, Ibadan.

Bambale, Y.Y. (2007), Islamic Law of Commercial and Industrial Transactions, Malthouse Press Limited, Lagos.

Bello, A. (2006), Interest-Free Banking? Yes!, Ahmadu Bello Publications, Kaduna.

Garner., B.A. (1990), **Black's Law Dictionary 3rd Edition,** West Publishing Company, London.

Encyclopedia Britannica (2005)

Jimoh, A. (2002), Nigerian Investment Laws And Business Regulations (Vol. 1), Learned Publishments Limited, Lagos.

Kharofa, A. (2004), Transactions In Islamic Law, A.S. Noordeen, Kuala Lumpur.

Mawdudi, A.A. (1988), Towards Understanding the Quran, Markfeild, Leicester, United Kingdom.

Microsoft Encarta Encyclopedia (2008)

Muslehuddin, M. (2008), Banking & Islamic Law, Adam Publishers & Distributors, New Delhi,

Oluyombo, O. (2004), Non-Interest (Islamic) Banking: Principles and Practice, Kings & Queen Associate, Lagos.

Paramanik, **H.A.** (2009), Islamic Banking How Far Have We Gone, IIUM Press, International Islamic University, Malaysia.

Qutb. S. (1999), In the Shade of the Quran, Markfield, Leicester, United Kingdom.

Saleh, A. (2003), An Introduction To Islamic Economics And Banking System, Gidan Dabino Publishers, Kano.

Samadani, A.E.M. (2007), Islamic Banking and Uncertainty, Darul Ishaat, Karachi.

Sasegbon, D. (1991), Nigerian Companies and Allied Matters Law And Practice (Vol. 1), DSc Publication Limited, Lagos.

Siddiqi, N.M. (1983), Banking Without Interest, Islamic Foundation, Leicester, UK.

Usman, T.M. (2010), An Introduction To Islamic Finance, Quranic Studies Publishers, Karachi.

Usmani, T.M. (2010), The Historic Judgment On Interest, Quranic Studies Publishers, Karachi.

Zowk, O. (2011), A Brief Sense On Islamic Business Practices, Dar-Al-Quran, London.

B. Conference Papers

Jaiz Bank Plc, 2014 Annual Report & Accounts.

Bigsten, A. (1987), "*Poverty, Inequality and Development"* in Gemmel, Surveys in Development Economics, Oxford: Blackwell.

Uzair, M. (1976), "*Some Conceptual and Practical Aspects of Non-interest Banking,"* a Paper Presented at the First International Conference on Islamic Economics held at Makka.

C. Articles- Journal Publication

Vanguard Newspaper, Saturday, 27th April, 2012, p.14

http://www.imf.org/external/pubs/ft/wp/2011/wp11156- (assessed on 16th August, 2012)

http://www.islamicbanking.nl/chap4.html- (assessed on 19th August, 2012)

http:// Ibfn.wordpress.com- (assessed on 24th August, 2012)

http://www.isdbcareers.com andUaelaws.files.wordpress.com - (assessed on 28th August, 2012)

http:// www.belloabd2005@yahoo.com- (accessed on 17th June, 2014)