AN ASSESSMENT OF THE DEFINITION OF NON-INTEREST (ISLAMIC) FINANCIAL INSTITUTION IN NIGERIA

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ABSTRACT

The existence of the definition of Non-interest Financial Institution banking (NIFI) calls for the need to examine the practical definition of NIFI (Islamic banking system) in Nigeria. This becomes absolutely necessary to avert any possible misconstruction of the intent of the CBN guidelines. The article adopted the use of doctrinal methodology wherein both primary and secondary data were utilized. The primary data utilized was from hadith, while the secondary data was sourced from CBN guidelines and case laws. It is the contention of this article whether the definition of the CBN guideline of 2009 on NIFI and the same latter repeated in the 2016 regulation on Non-Interest (Microfinance) Bank can actually stand the test of reality. It is the findings of this article that, there is the need to readjust the definition of NIFI which aim at compliance with the principles of Shariah in a way that the definition will reflect the applicable school of thought in matters relating to Islamic Commercial Jurisprudence. It is therefore recommended that, CBN should amend the guideline and same to be reissued in a way that a specific school of thought will be specified and also adopts the use of 'any other similar transaction' where prohibitory dealings were mentioned.

1.0 INTRODUCTION

Before a clear assessment of the CBN definition of Islamic banking will be done , there is the need to understand what an NIFI (otherwise called Islamic banking)

1.1 WHAT IS ISLAMIC BANKING?

The term Islamic banking refers to a banking activities or a system of banking that is in compliance with the basic principles of Shariah[1]. It is also known as interest free banking

[1] A Primer on Islamic Finance: Definitions, Sources, Principles and Methods Alsadek *University of Wollongong*, ahag999@uow.edu.au Andrew C. Worthington *University of Wollongong*, a.worthington@griffith.edu.au Research Online is the open access institutional repository for the University of Wollongong p.16

system since Shariah disallows the acceptance of *riba* or interest rate for the accepting and lending of money.

Generally, banking is a key subsector in the legal and economic field. The word "bank" is said to have been derived from the Italian word "banco", meaning shelf or bench, on which the ancient money changers used to display their coins. The bench of a banker or money changer was broken by the people if he failed in business and this probably is the origin of the word "bankrupt"[2].

The definition of the term bank has been belabored by various opinions and digress views. But what is certain in law is that, banks are financial institution regulated by law:

> *" Bank is a Quasi public Institution for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts and issuance of its own promissory notes payeable to bearer as currency or for the exercise of one or more of these functions, not always necessarily chartered but sometimes so created to serve the public ends."*3

Banks are business ventures which aim at gain earning. In fact, in **UBN PLC VS IFEOLUWA,** it was stated that: *"A bank is not a charitable organization, it is a trading company. When therefore a bank advances credit or a loan to its customers, the bank is therefore entitled to interest."*[4]

Conventionally, banks are financial institutions that get profit through some basic legalized modes of earning or benefit in terms of monetary values called interest. Interest could either be as a matter of right or power which could be conferred by statute[5]. In fact, in the case of **ILOKOSON & CO. Nig. Ltd Vs UBN Plc[6]**it was held that: *"Award of interest in Nigeria is still subject to the common law principles and practices. Thus, interest may be claimed where it was contemplated by the agreement between the parties or under a merchantile practice or under a principle of equity such as breach of fiduciary relationship. By universal custom of banking, a banker has the right to charge interest of a reasonable rate".*

[2] Muslehuddin, 1993, p. 5, cf. *Encyclopedia of Banking and Finance*, Boston.
[3] Wema bank plc vs Osilaru (2008) 10 NWLR pt 1084 p.634
[4]In UBN Vs Ifeoluwa (Nig) Ent. Ltd (2007) NWLR pt 1032 @ 74
[5] UBN vs Ifeoluwa (Nig) Ent. Ltd (supra)
[6]ILOKOSON & CO Nig. Vs UBN plc (2009) 1 NWLR Pt 1122 @ 276.

It was further held that in the above cited case that:

> *"Where there is no express agreement as between a banker and the customer as to the rate of interest payeable, the bank is entitiled to charge interest rate payable, on the basis that is established custom to that effect or that the customer has impliedly consented."*

In **UBA plc Vs Lawal**[7] it was held that:

> *"As long as there is a loan or overdraft facility which remains unsettled, it must attract interest either in accordance with the agreement at the grant of the facility or in accordance with the practice, usage and custom of banking institution."*

Also in **Rickett vs B.W.A Ltd**[8] it was stated thus:

> *"Compound interest is chargeable only where the customer has agreed to it, or where he is shown in the account being kept on that basis".*

In conventional banking system, there exists some basic parties such as the bank, the customer and other agents of the bank. The relationship between a bank and its customer is that of an agent and principal and that of the debtor and its creditor. The relationship is essentially contractual. [9] The act of engaging in banking is called banking business.

By Section 66 of BOFIA, 2004:

> *A banking business is a business of receiving deposit on current accounts, saving accounts or other similar account, paying or collecting cheque drawn by or paid in by customers, provision of finance or such other business as the Governor may by order publish in the federal Gazzete, designated as banking business*.

The following are some of the features of banking as held in **WEMA BANK PLC VS OSILARU**[10]:

a) That a bank is a legal body statutorily regulated and backed.

[7]UBA plc Vs Lawal (2008) 7 NWLR pt 1087 @ 619
[8]Rickett vs B.W.A Ltd (1960) SCNLR 227
[9]UBN Vs Ifeoluwa (Nig) Ent. Ltd (2007) NWLR pt 1032 @ 74
[10] Wema bank plc vs Osilaru (supra)

b) That ownership of deposit pass to the bank which can deal with the same without reference to its customer.
c) It is profit oriented.
d) That it can create its own legal tender or currency like drafts, promissory notes etc.

Therefore, the accordance of any corporation as a bank must have fully satisfied the aforementioned criteria. As for NIB, it shares similar characteristics with the conventional banks as above save the issue of permissibility of interest and also some products it does offer.

A bank is an institution authorized to take deposits for the purpose of extending long and short-term finance facilities[11].

Coming back to NIFI, The principles of Islamic Banking are as embedded in the norms of Islamic financial jurisprudence and in turn an extraction from Shariah. Although, many descriptions of Islamic Banking have been proffered by different scholars in Shariah, but however, they all tailored towards the same direction by simply directing 'compliance of a bank with the principles of Shariah'. Therefore, the Islamic Banking structure runs through the various depictions of its fundamental principle. However, a broad legal definition can be given thus:

> *"A system of banking that is in compliance with the principles of the Islamic law"*[12]

The principle of Islamic Banking deals with general appeal for justice and lay emphasis on moral and ethical values in all human dealings and transactions. In particular, Islamic law (*Shariah*) prohibits the collection and payment of interest charge called *Riba*. Islamic jurisprudence prohibits investing in businesses that are unlawful or known as haram and are contrary to Islamic values. Also, contracts where ownership of goods depend on the occurrence of a predetermined, uncertain or put in the future (chance) and speculative transactions prohibited by Islamic law because all involve excessive risk and are supposed to foster uncertainty and fraudulent behavior.

Because of the importance attached to justice in Islam, the first purpose of Islamic Banking in every financial system including Nigeria is: '*the establishment of a monetary and credit system based on f-airness and justice (as delineated by Islamic Jurisprudence)* for the purpose of

[11] Ibid p.12
[12] Ibid

regulating sound circulation of money and credit to enhance the growth of the country's economy'.

By the CBN guideline of 2011, a NIFI is;

> *"A bank which transacts banking business, engages in trading, investments and commercial activities, as well as the provision of financial products and services in accordance with the principles and rules of Islamic commercial jurisprudence*[13].

The CBN guidelines of 2011 stress the necessity of compliance of an IB with the dictates of *Shariah* as enshrined in the philosophies of Islamic commercial jurisprudence[14]. It would therefore be necessary to understand Shariah (Islamic law), Fiqh (principles of Shariah), and Usul-Fiqh (Science of Jurisprudence) relating to Islamic Banking.

The Holy Quran provides thus:

> *"Then We have put you (O Muhammad) on a plain way of (our) commandment so follow the monotheism and its laws and follow not the desire of those who know not.*[15]*"*

As a technical term, the word Shariah was defined by al Qurtubi[16] as 'the canon of Islam containing all the different commandments of Allah to mankind. The principle of finance falls under the branch of *Fiqh* called *Fiqh* al-*Muamalat Al- Iqtisaddiyyah* i.e the ruling concerning the management of the finance of the state and its economic system. The end result of the human activities relating to these principles gives rise to *hukm* (Judgement) which is the ruling deducted from different sources of Shariah concerning an action by a morally responsible person(s)[17].

One of the main elements of consideration of Shariah (also applicable in Islamic finance) is "Public Interest" which is seen as *Fard*/*Wujub* i.e what is compulsory or obligatory (it is a principal objective of Islamic Commercial Jurisprudence). This is referred to as absolute commands which are supported by decisive proof and any disobedience to it without any legal excuse is a sin. Here, it is a combination of both *Fard Ayn* (individual obligation) and *Fard*

[13] Paragraph 1 of the CBN draft framework on the regulation and supervision of Non-interest Financial Institution, 2009 .
[14] By the CBN guideline, IB means a bank which transacts banking business, engages in trading, investments and commercial activities, as well as the provision of financial products and services in accordance with the principles and rules of Islamic commercial jurisprudence.
[15] Q36:15
[16] Al-Qurtubi, Muhammad bin Ahmad, *al-Jāmi' li Ahkām al-Qur'an*, Cairo, Dār al-*Sa'b* (ND) vol. ii, p.205
[17] Ibid p.207

Kifayat (collective responsibility). It is of general belief that, Shariah in all its parts aims at securing benefits for the people or protecting them against corruption in terms of all their interests including the economic aspect which is one of the principal objectives of Islamic law.

The guideline's definition of IB captures, to a large extent, what an IB ordinarily should be within the context of any given society. However, specifically within the context of the Nigerian legal system and within the realm of Islamic law, it would then come to mind whether this definition suffices or whether this definition is a general one which will still be subject to a specific school of thought preference.

In the case of **ALHAJI ILA ALKAMAWA V. ALHAJI BELLO and ANOR** [18]where Per Wali JSC (p.15) paragraph A_B) held that:

> *"What is the difference between customary law and Islamic law? Islamic law is not the same as customary law, it does not belong to any particular tribe, it is a complete system of universal law, more certain, and permanent and more universal than English law.*

In the Supreme Court case cited above, Per Wali makes a clear distinction between Islamic law and customary law, in that Islamic law is more universal in nature. The universality here as stated by the learned justice is in terms of general terminology called "Islamic law". It is without any doubt that there are many scholartic opinions on every legal issue under Shariah on any given subject matter particularly under Islamic commercial jurisprudence.

According to **Abdullahi Gazali**[19], though there are several sects within the Nigerian Muslim community, religious ruling are not restricted to a particular school of law notwithstanding the several judicial matters relating to the Muslims. This is further portrayed in the case of **OGESUN VS. SIDDIQ**[20] where it was held that Maliki law is predominantly the applicable Muslim law only in the north. Therefore, the question one will then ask is; what about other parts of the country?

This is becoming more contentious because applying the general yardstick of Islamic commercial jurisprudence is a general term which could have several implications in Islamic law. To some, Islamic jurisprudence here may be termed as due compliance with the dictates

[18] Alhaji Ila Alkamawa Versus Alhaji Bello and ANOR (1998) LPELR- SC.293/1991
[19] Abdullahi Ghazali (2003) Maliki law the predominant Muslim law in Nigeria
[20] Ogesun vs. Siddiq(1979)NNLR 29

of Maliki principles of commercial law while to others it may mean compliance with the principle of Hanafi's principles of commercial law and a host of other authoritative guides . The question then is: which of these many principles of Islamic school of thought on commercial jurisprudence is to be applied? Therefore the definition in the CBN guideline has only succeeded in giving a general definition which is vague and could lead to possible confusing circumstances at any given point in time as to which school of thought is to be followed[21]. In the case of **ADESUBOKUN V. YINUSA[22]** it was settled that in case of Islamic Personal law (on will), Maliki law is particularly applicable in Nigeria. It would therefore be more accurate to state a particular school of thought in order to avert any possible misapplication of the intent of the law.

Also, the guideline of the CBN on Non- Interest Bank of 2013 provides for general prohibited dealings. These items includes prohibition of Interest, uncertainty or ambiguity relating to the subject matter, terms or conditions, gambling, speculation, unjust enrichment or exploitation/unfair trade practices etc. These dealings expressly mentioned by the guidelines are clear and unambiguous. However, the prohibitions are very open ended because only a thin line sometimes exists between what may be lawful and what could be tagged as unlawful. Even the prophet (SAW) was reported to have said that indeed the lawful is clear and the unlawful is clear and between them are act which are not clear, most of this not known by men[23].This is because, if care is not taken, a misapplication may occur in the same process. Therefore, the use of the phrase "any other similar transactions" could have solved any possible confusion in the application of the guideline.

1.2 CONCLUSION

Though the CBN has offered a definition for NIFI (Islamic banking), there is an outright need to review this definition in other to properly reflect the special features of this financial system. This is very obvious when the issue of the application of a specific school of thought in the administration and adjudication of commercial matters in an Islamic bank come to play. It is therefore recommended that the CBN should state the specific school of thought that would be directly applicable in matters bordering on Islamic Commercial Jurisprudence.

[21] Draft framework for the regulation and supervision of NIBs in nigeria, march 4, 2009
[22] Adesubokun Vs Yinusa (1971) LPELR- SC25 1970
[23] Sahih Bukhari, 12561

Also there is the need to limit the extent of the permissibility and non-permissibility of transaction as same is left quite open ended and may probable be limited by the use of such as "any other similar transactions" so as to avert misconstruction and misapplication of the provision of Shariah.