

IMPLEMENTING ISLAMIC MICROFINANCE IN NIGERIA: A MATTER OF EQUITY AND SOCIAL JUSTICE

Abayomi Al-Ameen*

ABSTRACT

Many hardworking people from unprivileged backgrounds are automatically disadvantaged simply because they lack access to financial capital. Observably, microfinance provides a way out of the poverty trap if it is deployed appropriately. Nigeria, like many other developing countries, has thus taken up the challenge of developing inclusive microfinancing initiatives. In the country, funding for small-scale businesses is available from both the government and the private sector. Unfortunately, the nature and conditions of the schemes fail to meet the sensitivities of a substantial group who would otherwise have been eligible for the grants and loans. The practical implication is that such group would be twice excluded from the financial system. These potentially excluded groups are those poor Muslims who might desire funding but are unable to benefit from the government schemes because the loan conditions contradict their faith. It is argued that the effect of the status quo is that it breeds further inequality and inequity and could even amount to outright (or indirect) discrimination. This contention is substantiated through constitutional analysis and also in light of a contemporary economic welfare theory – the Capability Approach. The article argues that this marginalized group has a right to Islamic microfinance. This right, it is further contended, places justiciable (positive and negative) duty on the government. It, therefore, calls that Islamic microfinance should forthwith be embedded into the fabric of public governance in the country. The article demonstrates the exclusionary problem by analysing some of the existing schemes, and it proffers alternative sharia-compliant conditions for existing schemes.

Keywords: Islamic microfinance; social development, distributive justice; indirect discrimination; constitutional law/human right, capability approach.

DOI: <http://dx.doi.org/10.4314/jsdlp.v7i2.10>

* Lecturer in Commercial Law, Cardiff School of Law and Politics, Cardiff University, UK.

1. INTRODUCTION

The importance of financial inclusion to socio-economic development has gained substantial recognition in recent times.¹ Hence, though the ratio of those excluded from financial services remains critically high,² governments are increasingly directing their policies towards correcting the problem of exclusion with the ultimate aim of lifting people out of poverty.³ One of the measures used to achieve this laudable goal is through the introduction of microfinance.⁴ While the true impact of microfinance remains debatable,⁵ it, in principle, aims to lift some of the underprivileged out of the poverty trap, especially if the financing

-
- 1 See e.g., C Park and R Mercado, 'Financial Inclusion, Poverty, and Income Inequality in Developing Asia' *ADB Economics Working Paper Series* Paper No. 426 (January 2015); A. Sharma, S. Kukreja, 'An Analytical Study: Relevance of Financial Inclusion for Developing Nations' (2013) 2(6) *International Journal of Engineering and Science* 15-20.
 - 2 This is especially true in sub-Saharan Africa where as at 2011, only about 5 per cent of the people had access to loans. See F. Allen et al, 'The African Financial Development and Financial Inclusion Gaps' World Bank Development Research Group Working Paper 7019, 2 (September 2014).
 - 3 For example, there has been an increase in the number of people that have transaction account. In 2011, only 42 per cent of adults had an account but by 2014, that number had increased to 54 per cent. See World Bank, 'Universal Financial Assess: Global Progress' <<http://ufa.worldbank.org/global-progress>> accessed 18 September 2016. Access to banking services has been noted as the first step towards fighting problems such as poverty. See World Bank, *ibid*.
 - 4 Microfinance has been recognized as one of the means for achieving financial inclusion. See Sebastian-A Molineus, (Comment at the World Bank Research department Policy Research Talk, March 2013) on the topic 'Does Microfinance Still Hold Promise for Reaching the Poor?' <www.worldbank.org/en/news/feature/2015/03/30/does-microfinance-still-hold-promise-for-reaching-the-poor> accessed 18 September 2016. Contrast this with the opinion that microfinance locks the poor in poverty trap. See M. Bateman and H. Chang, 'Microfinance and the Illusion of Development: From Hubris to Nemesis in Thirty Years' (2012) 1 *World Economic Review* 13-36.
 - 5 Research shows that microfinance does harm but also improves the welfare of the poor. See C. van Rooyen, R. Stewart, T. de Wet, 'The Impact of Microfinance in Sub-Saharan Africa: A Systematic Review of the Evidence' (2012) 40(11) *World Development* 2249-2262; A. Babajide 'Effects of Microfinance on Micro and Small Enterprises (MSEs) Growth in Nigeria' (2012) 2(3) *Asian Economic and Financial Review* 463-477; Bateman and Chang (n 4).

schemes are subsidized.⁶ Nigeria is one of the countries that have made efforts to bolster the prospects of microfinance through government subsidy schemes that are often implemented directly or in conjunction with the private sector. Hence, perhaps now more than ever, there is some level of support, which can bolster the opportunities for the poorest as well as and small businesses with the real prospect of changing lives.

Like the overall banking system in the country, the microfinance system in Nigeria is firmly nested on the Western neo-classical economic paradigm. Perhaps this owes much partly to its colonial past⁷ and partly to the spate of globalization.⁸ Successive governments continue to develop policies and practices based on the conventional finance model, which appears to be fully embedded into the system. The present system feels so normal that the unwary is likely to consider the status quo as the only viable way to understand and run an economy (and by extension, a microfinance system). However, experience elsewhere shows that there is a viable alternative.⁹

The article stresses the imperativeness of embedding Islamic microfinance into the Nigerian system. It contends that while such an alternative might appear to be a matter of policy choice and priorities, the circumstance in Nigeria makes it more of a public duty. Hence, the absence of deep initiatives on Islamic microfinance should thus be seen as a scandal. In a country with over 80 million Muslims, the absence of an ingrained sharia-compliant financial machinery amounts to a gross failing in governance.

The article, therefore, argues for the substantial overhauling of the socio-economic policies that underlie Nigeria's microfinance system. The key to this exercise is the need to embed Islamic microfinance

6 M. Hudon and T. Traca, 'Subsidies and Sustainability of Microfinance' Centre Emile Bernheim Research Institute in Management Sciences Working Paper: WP-CEB 06-020 (October 2010); J. Morduch, 'The Role of Subsidies in Microfinance: Evidence from the Grameen Bank' (1999) 60 *Journal of Development Economics* 229-248.

7 O. Adeyeri and K. Adejuwon, 'The Implication of British Colonial Economic Policies on Nigeria's Development' (2012) 1(2) *International Journal of Advanced Research in Management and Social Sciences* 1-16.

8 Bateman and Chang (n 4) 30.

9 The experience of Sudan is particularly noteworthy. See E. Ahmed and A. Ammar, 'Islamic Microfinance in Sudanese Perspective' (2015) 4(3) *Journal of Business Finance Affair* 149.

partly because it will play a key role in achieving real welfare advancements. Even more importantly, Islamic microfinance must be embedded because (as would be argued) it keeps in line with the duty to vindicate the inalienable rights of a substantial group. Failure to take necessary action would raise serious issues of governance failure, breach of fundamental rights, and (indirect) discrimination through socio-economic exclusion. For example, the article contends that governments' policy prescriptions and initiatives, which do not incorporate sharia-compliant principles, are not only insensitive but also amount to a breach of justiciable rights. It is, therefore, imperative for the Nigerian government to implement concrete measures to address the present anomaly. The article will also suggest how present measures and schemes can be modified.

To proceed with the task, the paper is divided into six sections. Section 1 draws attention to the core issues emanating from the microfinance policy in Nigeria. Section 2 establishes the constitutional basis for the justiciability of the right to Islamic microfinance. Section 3 imbues the right to Islamic microfinance with substantive content and identifiable economic welfare basis. I adopt the Capability Approach (CA) for this purpose. Section 4 fuses the legal and economic basis for Islamic microfinance while section 5 details potential ways to apply Islamic microfinance principles by reviewing some of the government schemes. Section 6 contains the conclusions.

2. MICROFINANCE IN NIGERIA: THE INEQUALITY DETERMINED

Despite its oil wealth and the fact that it is Africa's largest economy, many Nigerians are under the tight grip of poverty. Out of a population of around 180 million, about 110 million are said to be living in abject poverty.¹⁰ Inequality¹¹ is rising at an alarming rate,¹² and this is

10 The Country Director of the World Bank for Nigeria, Marie-Francoise Marie-Nelly, disclosed this while delivering the World Bank's Country Programme Portfolio Review. See A. Adike, 'Rising Inequality and the Challenge of Change in Nigeria' (2014) 4(9) *International Journal of Humanities and Social Science* 208-210.

11 There are different views on how to delineate principles of equity. It could mean: 'fairness' in distributions e.g. John Rawls, *Theory of Justice* (Cambridge MA, Harvard University Press 1971); equal opportunity; treating people with equal concern and respect e.g., Ronald Dworkin, *A Matter of Principle* (Cambridge MA, Harvard University Press, 1985); and that alike cases should be treated as alike.

12 Adike (n 10).

particularly exacerbated by the lack of access to financial services for a vast section of the public. It has thus become even more imperative that policy initiatives are put in place to arrest the worrying trend. Rightly, the Central Bank of Nigeria (CBN) in 2012 initiated a bridging drive termed the National Financial Inclusion Strategy (NFIS). Its overall target is to reduce the number of adults excluded from financial services from 46.3 per cent in 2010 to 20 per cent in 2020.¹³ The NFIS, together with the Microfinance Policy, has led to some successes, as there has been relative ease in the process of obtaining capital.¹⁴ A direct evidence of this is that there are now over 1,000 microfinance institutions (MFIs) operating in Nigeria.

Apart from its initiatives aimed at facilitating the growth of the microfinance industry, the government has also provided funds for microfinance banks. In 2015, the CBN injected N220 billion into the microfinance sector at 9 per cent interest rate to MFIs. The CBN also runs an agro-credit scheme, which provides guarantee cover to banks who give loans to the farmers. Other initiatives include the Rural Banking Programme, sectoral allocation of credits, and concessionary interest rate.¹⁵ The government also created the National Poverty Eradication Programme (NAPEP) with the mandate of providing financial services to alleviate poverty.

To operationalize the different grants and developmental schemes, the Nigerian government has established several development finance institutions. They include the Bank of Industry (BOI), and the Federal Mortgage Bank of Nigeria (FMBN). Also, there is the Infrastructure Bank Plc,¹⁶ and the proposed Higher Education Bank. The pro-poor institutional bodies also include the National Directorate of Employment

13 Stakeholders affirm commitment to the National Financial Inclusion Strategy Implementation (2016) 1(1) *Financial Inclusion Newsletter* 1.

14 According to Tokunbo Martins, the Director, Banking Supervision Department at CBN, the ratio of Nigerian with access to financial services has increased from 40 to 60 per cent. See 57 million Nigerians now have access to financial services – CBN (News24 Nigeria 16 Feb 2016) <www.news24.com.ng/National/News/57-million-nigerians-now-have-access-to-financial-services-cbn-20160212>. Accessed 18 September 2016

15 CBN, 'Microfinance Policy, Regulatory, and Supervisory Framework for Nigeria' (December 2005). <www.cenbank.org/Out/publications/guidelines/DFD/2006/MICROFINANCE%20POLICY.pdf> accessed 18 September 2016 Hereinafter referred to as CBN Microfinance Policy.

16 Note that the government holds only a minority share in this establishment.

(NDE), the Nigerian Agricultural Insurance Corporation (NAIC), and the Bank of Agriculture (BOA), which has the mandate of enhancing the provision of finance to the agricultural sector.

There are also initiatives from commercial banks to facilitate access to funds. For example, a group of top commercial banks named the 'Bankers' Committee' agreed to set aside 10 percent of their pre-tax annual profit for equity investment in the microfinance sector. Keeping to their promise, the Banker's Committee promised to devote N300 billion to the SME sector in 2016.¹⁷

Some of the programmes do not merely provide funds; they also facilitate skill acquisition, help to address marketing challenges, and with regards to farmers, they help to reduce the post-harvest losses. An indication of the overall drive to bridge the gap is reflected in the fact that the BOI, for example, devotes 85 per cent of its resources to SMEs while 15 per cent goes to large enterprises that have linkages with small or medium enterprises. One of the BOI's programmes is the Bottom of the Pyramid (BOP) scheme, which caters for the most downtrodden. The institution disburses funds to the most deprived through participating MFIs. The scheme leverages on the spread of MFIs to maximize its reach.¹⁸

The Problem

Despite existing flaws and shortcomings, the deepening of the microfinance sector in Nigeria has raised hope that the poverty trap may gradually ebb off. Some commentators have thus recognized the prospects of the industry in particular¹⁹ and the role it could play in reviving the wider economy.²⁰ However, while it appears on the surface that the poverty reduction initiatives give fair opportunities to

17 Nigerian banks budget N300b loan to SMEs, agric sector (*The News Nigeria* 13 Dec 2015) <<http://thenewsnigeria.com.ng/2015/12/nigerian-banks-budget-n300b-loan-to-smes-agric-sector/>> accessed 18 September 2016

18 BOI, 'Bottom of the Pyramid Scheme' <www.boi.ng/wp-content/uploads/2015/08/Bottom-of-the-Pyramid-.pdf> accessed 18 September 2016.

19 C. Anyanwu, 'Microfinance Institutions in Nigeria: Policy, Practice and Potentials' (Paper Presented at the G24 Workshop on 'Constraints to Growth in Sub Saharan Africa' Pretoria, South Africa, 29-30 November, 2004).

20 C. Jegede, J. Kehinde, B. Akinlabi, 'Impact of Microfinance on Poverty Alleviation in Nigeria: An Empirical Investigation' (2011) 2(1) *European Journal of Humanities and Social Sciences* 97-111.

potentially qualified candidates, the reality is more disturbing – all the government programmes deploy a myopic microfinancing approach. Practically all the funds available are channelled through interest-bearing avenues. In this regard, it is worthy to note the observation of Brigit Helm that to tackle poverty, ‘diverse approaches are needed. A one-size fits-all solution will not work. Diverse channels are needed to get diverse financial services into the hands of a diverse range of people who are currently excluded. Making this vision a reality entails breaking down the walls, real and imaginary, that currently separate microfinance from the much broader world of financial systems.’²¹ This is why it is quite baffling that the financial system in Nigeria has remained primarily one-dimensional for so long. While there might have been sporadic interest in developing alternative means of finance (such as Islamic finance), no real effort was made to restructure the economic and financial landscape.

The unwary might miss the problem here. For a country with a (contested) Muslim population that constitute half (little more or little less) of the overall population, the failure to diversify the microfinance approaches amounts to more than mere blameworthy oversight. Rather, it could indicate gross injustice. The Muslim’s Holy Quran forbids certain financial dealings in the strongest terms.²² So it should not be a surprise that some poor Muslims would still not consider the government schemes as viable options. While some would feel helpless, and so engage in such prohibited transactions even though their heart rejects it, one cannot disregard the possibility of a significant section that would not approach such avenues even if funds was offered to them at a 0.01 per cent interest rate.²³ One of the subtle effects of the

21 Brigit Helm, *Access for All: Building Inclusive Financial Systems* (World Bank Group Publications, 2006) 2.

22 Quran 2: 275 states that ‘Those who eat Riba (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by Shaitan (Satan) leading him to insanity. That is because they say: ‘Trading is only like Riba (usury),’ whereas Allah has permitted trading and forbidden Riba (usury). So, whosoever receives an admonition from his Lord and stops eating Riba (usury) shall not be punished for the past; his case is for Allah (to judge); but whoever returns [to Riba (usury)], such are the dwellers of the Fire - they will abide therein’ Hilali and Khan’s interpretation of the meaning.

23 Note the survey conducted in one of the Northern states (Kano State). See A. Muhammad and M. Zakaullah, ‘Applicability of Islamic Micro-Investment Model in Kano State, Nigeria: Empirical Evidence’ (2013) 7(4) *Australian Journal of Basic and Applied Sciences* 535-542.

circumstance-induced exclusion is the social 'deadweight loss' it generates. Statistical data or fancy formulas and micro-economic indicators cannot capture the voice of those unknown Muslims. Yet, they are important. Thus, one cannot seek to defeat the claim in this paper by alluding to the lack of concrete proof of the existence of such group of Muslims. It would simply be self-referential, antithetical, and unintelligent for anyone to seek to undermine the plight of the unnoticed by seeking empirical evidence of the existence of such a group. A simple reference to the books of Islam, which abhors interest-bearing financial transactions without qualification, should be sufficient to prove that such group exists.

The preceding underscores the call for a restructuring exercise that takes an ethnographic view of the different societies to ensure that a truly inclusive economic agenda would have been more ideal. Unfortunately, by the passage of time, the much needed economic restructuring is becoming more of a distant dream. The successive governments' numbness to societal pulse may be attributable to political factors some of which are unbecoming²⁴ while some others are outright ludicrous.²⁵ Meanwhile, to the extent that it concerns Islamic finance, the real impact of the lack of political will manifests itself through the automatic exclusion (albeit indirectly) of a large group simply because they are unable to compromise some of the core values of their faith. Any government that is serious about the impact of its policies should ensure that its initiatives meet the need of the diverse section of its society as much as possible.²⁶ This is especially so in Nigeria which has such strong and diverse cultural and religious communities.

The plight of the excluded poor Muslim is further heightened by the relative inattention of, and inadequate pressure exerted by, stakeholder organizations and individuals. The remainder of this section will, therefore, stress briefly the core problem and the relatively

24 For example, mental laziness, status quo bias, corruption, ineptitude.

25 There is often unfounded fear that establishing Islamic banks is a step towards 'Islamizing' the country. See M. Yunusa and N. Bint Nordin, 'Religious Challenges of Islamic Banking in Nigeria' (2015) 5 *International Journal of Academic Research in Business and Social Sciences* 85.

26 The Independent Commission on Good Governance in Public Services, *The Good Governance Standard for Public Services* (OPM and CIPFA, 2004) 14.

ineffective pressure exerted by a rather meagre section of the stakeholders.

Core Problem

As earlier stated, both the public and private sectors can provide microfinance. The arguments in this article are limited to policies and actions of the public authority. Any reference to the private sector would only be to substantiate issues relating to the policies and practices of government agencies in addressing public-private initiatives. The government's duties can be broadly categorized into two: initiating poverty alleviation programmes, and setting regulatory policies that would facilitate private sector engagement in poverty alleviation initiatives. The government has failed the significant Muslim population on both accounts. Of the two, the failure concerning the poverty alleviation programmes is more damning. Large amounts of the public funds are often made available to help the less privileged. But then, for no justifiable reason,²⁷ the conditions often automatically exclude the significant section of Muslims thereby negatively impacting on the socio-economic, political, and civic balance in the country. The case of the poor and financially excluded Muslim is particularly poignant as it brings to the fore an entrenched failure of successive government's economic policies. The Quran and the Prophetic traditions, which prohibit certain types of financial transactions, guide Muslims. Unfortunately, it is those prohibited elements that are the cornerstone of the global financial system. In effect, in the absence of suitable alternative, even if a section of the poor require some form of assistance, the fact that conventional microfinance is at variance with the injunction of their faith would mean that they are more likely to stay away from such scheme. This problem cannot be taken for granted as research shows that about 72 per cent of people living in the Muslim world do not use formal financial services. Out of the meagre 28 per cent that do, more than 40 per cent of them would not obtain microfinance loans because it involves paying interest.²⁸

27 A scheme can be targeted at a specific group thereby justifiably excluding others. For example, a scheme targeted at training a group of promising students or a scheme targeted at indigenes of a marginalized community.

28 N. Karim, M. Tarazi, and X. Reille, 'Islamic Microfinance: An Emerging Market Niche' (2008) CGAP Focus Note No. 49.

Indeed, the Nigerian government's Microfinance Policy²⁹ does not prohibit the establishment of Islamic microfinance institutions in Nigeria. Moreover, Islamic Microfinance Institutions (IMFIs) do exist in Nigeria some of which are successful.³⁰ Furthermore, the Central Bank of Nigeria recently approved guidelines for Islamic micro-finance banks in the country.³¹ So, is there much justification for the case being made in this article? As it will be shown, the reality reveals a direr picture than might initially appear.

Though rather sparing, some scholars have recognized the need for proper Islamic microfinance system in Nigeria. For instance, Islamic microfinance has been promoted because of its industry prospect.³² Some have also identified it as a key way to reduce endemic poverty within poor Muslim communities.³³ It has also been justified because there is a very significant Muslim population in Nigeria.³⁴

The existing literature in the area has aimed to showcase the value of, and the need for, Islamic microfinance. Notably, this paper approaches the question of Islamic microfinance in Nigeria from a much firmer perspective. It contends that Islamic microfinance is not just something to be considered, to be lobbied for, or done out of favour. Rather, it is a right which gives rise to corresponding duties. Importantly, therefore, the paper does not aim to justify the right to Islamic microfinance by merely alluding to the religious constraints on Muslims or by emphasizing the potential economic benefit from such initiative.

29 Published in 2005.

30 For an example of a successful IMFI in Nigeria, see T. Yusuf and A. Mobolaji, 'The Role of Islamic Micro Insurance in Economic Growth and Development: The Nigerian Experience: A Case Study of Al-Barakah Microfinance Bank, Lagos' (2012) 1(10) *International Journal of Business and Commerce* 106-122.

31 Central Bank of Nigeria, Guidelines on the Regulation and Supervision on Non-Interest (Islamic) Microfinance Banks in Nigeria (11 May 2016).

32 See, A. Mohammed and H. Zubair, 'Microfinance in Nigeria and the prospects of introducing its Islamic version there in the light of selected Muslim countries' experience' MPRA Paper No. 8287, April 2008; A Dogarawa, 'Financial Inclusion in Nigeria and the Prospects and Challenges of Islamic Microfinance Banks' (Conference Proceedings of the 2nd International Conference on Inclusive Islamic Financial Sector. Sudan Academy for Banking and Financial Sciences. Khartoum, Sudan, 9 October 2011).

33 M. Noibi, 'Islamic Development Bank's Microfinance Support Programme and the Growth of Small Scale Enterprises in Nigeria' (2014) 10(2) *Canadian Social Science* 98-107.

34 CBN Guidelines (2016).

Conclusively, the fact that such monumental problem has remained unspoken for so long only goes to show how endemic and systemic the problem is. The article will, therefore, focus more on government microfinance scheme because of the gravity of the distributive concerns that stems from wrongful policy formulation and implementation.

Evidencing the Problem

The scriptural evidence and common knowledge regarding the abhorrence of interest-based and speculative transactions in Islam should, in fact, be enough to substantiate the contention made in this paper. Nevertheless, effort would be made to draw some verifiable inferences from the Nigerian society to further strengthen the call for action. For example, statistics on the penetration of MFIs across the country would give a clue as to the enormity of the injustice caused by the unsuitable terrain that results from the government's financial policies.

By studying the business demography for a particular industry, it is possible to gather information that reveals numerous facts such as demography of consumer take-up of goods and services.³⁵ The information on consumer take-up, for example, would naturally elicit reaction businesses that would respond by either flocking to the areas where consumer interests are high or flee from those places with insignificant patronage.³⁶ As such, by studying MFIs in Nigeria, it is possible to observe a pattern that lends itself to the claim already made in this paper.

The spread of MFIs in Nigeria already tell the story of areas where customer interest is high and areas with very low customer interest. It so happens that Muslims mainly or overwhelmingly populate the states with potentially very low patronage. This is most evident in the fact that Kano, one of Nigeria's most populous states with a predominantly Muslim population, has only five Microfinance banks despite being a commercial hub while another commercial hub, Anambra (a southern

35 V. Cook, J. Larréché, E. Strong, *Readings in Marketing Strategy* (Beaconsfield, Scientific Press, 1989) 176. The importance of demographics has also been addressed in the context of Islamic banks. See M. Rashid, M. Hassan, 'Customer Demographics Affecting Bank Selection Criteria, Preference, and Market Segmentation: Study on Domestic Islamic Banks in Bangladesh' (2009) 9(6) *International Journal of Business and Management* 131-146.

36 *ibid.*

state with very few Muslim population and a total population less than half the population of Kano), has 75 microfinance banks. The spread of MFIs is very consistent with the hypothesis that poor Muslims in Nigeria are averse to conventional microfinance.

Even where the contrast is not as sharp, a similar pattern that proves the hypothesis still emerges. For example, Lagos State, with one of the largest populations in the country, has the lion's share of MFIs totalling 180. Though the majority of Lagos indigenes are Muslims,³⁷ the actual inhabitants of the state are very diverse with a substantial number of those inhabitants being from other southern states with a rather insignificant Muslim population. The high number can thus be attributed to the substantial presence of non-Muslims in the state. A similar explanation applies to Abuja, the country's capital. Furthermore, in comparison to other predominantly Muslim-populated states in the North, Katsina has a relatively high number of MFIs (22). This higher number is consistent with the hypothesis considering that Kaduna has a relatively higher non-Muslim minority. All other states that have very minimal non-Muslim population have extremely low numbers of MFIs. To put into perspective, the North-West and North-East of Nigeria which contains roughly half the population of Nigeria and has an overwhelmingly Muslim population has less than 10 percent of the microfinance banks operating in the country, yet the region has a higher poverty level.³⁸ How really can anyone justify public disbursements aimed at poverty eradication but yet manage to exclude such high population of the poor tacitly?

Perhaps it might be argued that the apathy in the predominantly

37 Lagos, *New World Encyclopaedia* <www.newworldencyclopedia.org/entry/Lagos> accessed 18 September 2016.

38 Based on report from Nigeria's National Bureau of Statistics, the poorest geopolitical zone is the Northwest on the average, 71.4 per cent of the people are poor. It is followed by the Northeast region, which has 69.1 per cent and the North central region, which has 60.7 per cent. Muslims overwhelmingly populate the three zones. Out of the 10 poorest states, eight of them have an overwhelming Muslim population. Sokoto, the seat of the Islamic authority in Nigeria, is the poorest state in Nigeria with a staggering 81.2 per cent of its population living in poverty. See Editorial, 'Here is The List of Top (10) Poorest States in Nigeria' (*Daily Mail Nigeria* 31 March 2016) <<http://dailymail.com.ng/list-top-10-poorest-states-nigeria/>> accessed 20 September 2016.

Muslim-populated states is more as a result of their economic docility.³⁹ Such contention would be rather uncharitable given that the economic system could very well have shaped their perceived 'docility' even before they were born.⁴⁰

By inference, it is fair to say that the direct initiatives and the guarantee schemes ran by the government have not benefited the poor in Muslim-dominated communities. The issue addressed has to be taken seriously as this article argues that it is not a matter that gives room for policy discretion. Rather, refusal to introduce a corresponding microfinancing mechanism aimed at absorbing the excluded segment should be seen as a gross violation and total failure of responsibility for which the government should be held culpable.

It is reiterated that the argument presented in this article should not be understood as compelling private financial institutions to diversify their approaches such as introducing Islamic microfinance.⁴¹ Rather, the focus is on government's usage of public funds and its approach to financial policy formulation. This, it is argued, creates a justiciable constitutional duty.

3. CONSTITUTIONAL BASIS FOR ISLAMIC MICROFINANCE

Similar to most democratic systems, Nigerian has enshrined in its constitution some provisions, which detail the responsibilities of the state and the rights of individuals. For example, the government is expected to aim at some economic and social objectives. There are also provisions detailing the inalienable rights of the citizens.⁴² Regarding the economic right of citizens, section 16 (1) of the 1999 Constitution

39 See G. Eze, *Understanding Poverty* (Onitsha, Good Time Press, 2011); Herbert Spencer, 'Report on Poverty in Northern Nigeria. Concepts, Causes and Alleviation Strategies' (1971) referred to in J. Aderonmu, 'Local Government and Poverty Eradication in Rural Nigeria' (2010) 6(5) *Canadian Social Science* 200-208. Spencer described the poor as 'bad fellows', good for nothing, vagrants and sots'.

40 See Kuren, 'Report on Poverty in Northern Nigeria. Concepts, Causes and Alleviation Strategies' (1978) referred to in Aderonmu (n 39).

41 However, where an MFI serves as the outlet for disbursing government funds, then it would have to apply sharia-compliant principles.

42 Chapter 4 of the 1999 Nigerian Constitution (as amended).

requires the government to control the economy in such a way that secures the maximum welfare, freedom, and happiness of every citizen on the basis of social justice and equality of status and opportunity.⁴³ Section 16(2) further requires the state to direct its policy towards ensuring the promotion of a planned and balanced economic development.⁴⁴ It also requires the government to ensure that the material resources of the nation are harnessed and distributed as best as possible to serve the common good.⁴⁵ The social objectives enshrined in section 17 of the Constitution also confirm the ethos of the Nigerian state. It affirms that the social order of the country is founded on the ideas of freedom, equality, and justice.⁴⁶ It further provides that ensuring equality of rights, obligations and opportunities for every citizen before the law should vindicate the social order.⁴⁷ Also, it provides for the maintenance and enhancement of the sanctity and dignity of the human person.⁴⁸ Section 17(3)⁴⁹ guards against discriminatory practices against any group regarding the opportunity afforded to them for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment. Finally, the provision mandates the state to provide public assistance in deserving cases.⁵⁰

The constitutional provisions stated above help to illuminate the concerns emanating from the constructive exclusion of Muslims from Nigeria's economic fabric. In light of the arguments proffered so far and the preceding constitutional provisions, it can be said that the Nigerian state's failure to entrench Islamic finance principles into the functioning of the public service means that their policies are not directed towards ensuring a planned and balanced economic development. The effect of such policy failings includes the potential domination of a group over another, which naturally results in a backlash from the marginalized group.⁵¹ Indeed, economic imbalance is a sure

43 Section 16(1)(b).

44 S.16(2)(a).

45 S. 16(2)(b).

46 S 17(1).

47 S. 17(2)(a).

48 S. 17(2)(b).

49 S. 17(3)(a).

50 S. 17(3)(g).

51 See C. Kwajah, 'Nigeria's Pernicious Drivers of Ethno-Religious Conflict' (2011) 14 *African Security Brief* 2. He noted that 'the ethnic or religious dimensions of the conflict have subsequently been misconstrued as the primary driver of violence when, in fact, disenfranchisement, inequality, and other practical fears are the root causes'.

source of conflict and insecurity.⁵² In a similar vein, this failure amounts to a form of indirect discrimination, which goes against the spirit of section 17(3)(a) of the Nigerian Constitution. To correct such anomaly, it is imperative that the government embrace its positive duties by promoting equality of opportunities as mandated in section 17(2)(a) of the Constitution.

While many would recognize and accept the constitutional duties detailed above, others may consider those provisions as merely aspirational and, hence, mere suggestions that help to shape the discretion of government agents in the performance of the policy making tasks.⁵³ A relatively moderate view would be that those provisions confer rights, but those rights are non-justiciable.⁵⁴ One of the arguments that are often made to justify these types of claims is that provisions on socio-economic rights address issues of policy which judges are not well equipped to handle.⁵⁵ This excuse will find support in the section 6(6)(c) of the Constitution as interpreted by the court in *Arch Bishop Olubunmi Okogie v The Lagos State*.⁵⁶ However, such literal interpretation of the Constitution would fly in the face of the reality in many parts of the globe. Moreover, it would be contrary to positions taken in some recent court decisions in or about Nigeria. For example, the 'right to education' which has great socio-economic implication was ruled by the Economic Community of West Africa States (ECOWAS) court to be justiciable in line with the Art 4(g) of the ECOWAS Treaty to which Nigeria is a signatory.⁵⁷ Also, the High Court in *Falana v A.G Federation*⁵⁸

52 G. Brown and F. Stewart, 'Economic and Political Causes of Conflict: An Overview and Some Policy Implications' *CRISE Working Paper No. 81* (February 2015) 24.

53 See A. Ojo, 'Constitution and Constitutional Changes in Nigeria since Independence' in J. Atanda and A. Aliyu (eds) *Political Development* (Proceedings on the National Conferences on Nigeria since Independence (Zaria, Gaskiya Corporation Ltd, 1985) 116-135.

54 For a contrary and more contemporary view, see I. Trispiotis, 'Socio-economic Rights: Legally Enforceable or Just Aspirational?' (2010) 8 *Opticon* 1826.

55 See Constitution Drafting Committee of the 1979 Constitution.

56 (1981) 2NCLR 337 at 350. See also *AG Ondo v AG Federation* (2002) 9 NWLR (Pt 772), 222.

57 *SERAP vs Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08.

58 Editorial, 'Court orders Nigerian Government to re-establish People's Bank' (Premium Times, Nigeria 3 June 2014) <www.premiumtimesng.com/news/163502-court-orders-nigerian-government-re-establish-peoples-bank.html> accessed 20 September 2016.

ordered the government to re-open the bank dedicated to providing soft loans for the poor.⁵⁹

Regardless of the purported terms that render certain provisions non-justiciable, it is possible to establish a justiciable claim on some issues that somewhat have socio-economic welfare implications without relying exclusively on sections 16 and 17. It is contended that giving the present circumstance, context, and broader implications, Islamic microfinance should be recognized as one of such issues which have strong socio-economic welfare implication but nevertheless justiciable because of its link to some fundamental rights. This would mean that the right to Islamic finance could be invoked under part 4 of the 1999 Constitution, which enshrines fundamental rights. This is because the argument for Islamic microfinance is not merely a claim about how scarce public resources should be utilized. Rather, it also concerns how already approved financial intervention policy initiatives should be conceptualized, actualized and implemented in the spirit of fairness, equality/equity, and justice.

The government owes poor Muslims negative and positive duties to provide Islamic microfinance as an alternative to conventional microfinance. Failure to uphold these obligations can be challenged on two broad grounds. First, the government can be shown to have flouted the Federal Character Act. Secondly, in light of developments in international human right and the contemporary ideas of freedom, government's shortcomings could very well offend the inalienable rights of the poor Muslims in Nigeria. The latter argument is more comprehensive and substantive while the former provides a procedural and statutory basis for substantiating the socio-economic injustice. Hence, the first justification will be briefly addressed in the next paragraph while the second justification would be fully elaborated upon in the next section.

Federal Character

Given that the absence of Islamic microfinance has a marginalizing effect, which dents the socio-economic balance of the country, it is the duty of the government, through its relevant agency – the Federal Character Commission – to problematize this issue and facilitate the necessary changes. Section 4(1)(d) of the Federal Character Act 1996

59 The law that justified the ruling was however repealed in 2015.

renders unacceptable any contention that policy prescriptions cannot be subjected to judicial review. The section requires the Commission to set an equitable formula for the distribution of socio-economic services, amenities, and infrastructural facilities.⁶⁰ It also mandates the Commission to establish modalities and schemes for redressing the alleged imbalances and reducing the fear of relative deprivation and marginalization in the Nigerian system of federalism.⁶¹ The Commission is also empowered to intervene in the operation of any agency of the Federal Government, which carries out a function relevant to that of the Commission but the latter is concerned that the function is not being effectively implemented.⁶² It also has the mandate to advise the Federal, State, and Local Governments to intervene and influence providers of services, goods and socio-economic amenities to extend such services, goods and socio-economic amenities to deprived areas of the country.

Though nothing should stop a direct claim against agencies involved in financial policy formulation (e.g., CBN), it would appear equally prudent to rely on such extant law that provides an uncontroverted basis for challenging the imbalance. As a body established by law, which has a primary aim of maintaining socio-economic balance, there can be no objection to the fact that the concerns raised in this article can be the subject of a judicial review⁶³ claim against the Federal Character Commission. Conclusively, therefore, even from a purely 'black letter' perspective, the claim for the introduction of Islamic microfinance principles in the implementation of government schemes is justiciable.

4. RIGHT TO SHARIA-COMPLIANT CONDITIONS FOR PUBLIC INITIATIVES

To successfully establish the need for Islamic microfinancing principle in Nigeria, one would have to go beyond merely identifying the legal procedural basis for such claim. This is because despite its justiciability, such right can still be treated as being of second-order status. Such

60 Federal Character Act, s. 4(1)(d)(i).

61 *ibid* s4(1)(d)(ii).

62 *ibid* s 4(1)(e).

63 I. Udofa, 'The Power of Judicial Review in the Promotion of Constitutionalism in Nigeria: Challenges and Prospects' (2015) 40 *Journal of Law, Policy and Globalization* 192-205.

treatment is especially possible if the fundamental rights, which underlie the claim of Islamic microfinance, are understood in the traditional sense – as granting mere negative rights.⁶⁴ For example, if the right to dignity of the human person is understood simply as a right against harassment, then the state and other citizens might be shown to have fulfilled their obligation by not harassing such a person. Such interpretation of the right might not be sufficient for establishing a compelling case against government's complicity where for example, they fail to provide adequate security, which emboldened some citizens to harass others. In a similar vein, though the previous section details the reasons for, and the legal basis warranting the introduction of, Islamic microfinance principles, it would appear sufficient that the state's duty has been fulfilled if it can be shown that the government has not directly acted against the right.

If the standard of proof needs to establish breach, government's actions or policies must directly negate the right to Islamic microfinance, the potency of the right would be weakened. This is more so as the motive for actions and policies can be effectively cloaked underneath some seemingly important ideals. Moreover, breach might be even more difficult to prove as cogent evidence might be required to link the government's actions and policies to the hardship faced by the identified group. While one might be able to gather some form of evidence (i.e., through interviews, focus groups and so on), the weight of such evidence can be compromised if the authorities simply allude to a different set of evidence. For example, they might aim to establish that the hardship faced by the identified group results from other factors, which the government would or is already tackling. In other words, one might have to establish a watertight counterfactual by demonstrating a likely standard of living that the deprived group would have had if government policies and actions had been more sensitive to their plight. Depending on the standard of proof required, such an approach to human right might dis-incentivize legitimate claims and also help to perpetuate the status quo.⁶⁵ On the other hand, if fundamental rights are seen to entail

64 See generally, Seth Kreimer, 'Allocational Sanctions: The Problem of Negative Rights in a Positive State' (1984) Faculty Scholarship Paper 1413.

65 See L. Kaplow, 'Optimal Proof Burdens, Deterrence, and the Chilling of Desirable Behaviour' (2011) 101(3) *American Economic Review* 277-80; 'On the Optimal Burden of Proof' (2011) 119 *Journal of Political Economy* 1104-1140.

positive duties, a breach can be more easily established by alluding to inaction or inadequate actions on the part of the authorities.⁶⁶

From the foregoing, we can ground a claim for the implementation of Islamic microfinance on the need to vindicate the fundamental right to dignity of human person or right to equal/equitable treatment. The negative duty may be shown to have been breached by alluding to the state of abject poverty within the excluded group. The positive duty might be shown to have been breached by alluding to the government's inattentiveness towards the task of embedding Islamic microfinance principles into policy initiatives that are targeted at the poor. It would be necessary from the outset to establish how such negative and positive duties are linked to the right to human dignity. The positive duties can be justified by the fact that the availability of sharia-compliant avenues would enable the twice excluded group to participate in government sponsored/managed microfinance schemes, thereby saving them from the indignity that results from poverty. Such claims are indeed worthy as Vizard *et al* note that '[t]he critical role of the idea of human dignity in ethical thinking about human rights, and the importance of viewing human rights as having legitimacy and validity within the ethical domain (rather than as simply being the 'products' of legal and institutional arrangements) are ... important themes.⁶⁷

Indeed, some courts have managed to tease out positive justiciable rights from seeming socio-economic issues successfully. The South African and Indian experiences are especially worthy of note. In the South African case of *Khosa v Minister for Social Development*,⁶⁸ the exclusion of permanent residents from the social housing scheme was challenged. The court held that such policy was unconstitutional because it offended the principle of equality and human dignity. The court had succeeded in indirectly pronouncing on an issue that is primarily about socio-economic right by vindicating the claim through

66 See C. Gamzhi, 'Challenges of Enforcement of Fundamental Human Right under the Constitution of the Federal republic of Nigeria 1999' (Dissertation submitted to the Nigerian Institute of Advanced Legal Studies) <www.nials-nigeria.org/projects_CHALLENGES%20OF%20ENFORCEMENT%20PROJECT.pdf> accessed 20 September 2016.

67 P Vizard, S. Fukuda-Parr, and D. Elson, 'Introduction: The Capability Approach and Human Rights' in Vizard et al (eds) *Human Right and the Capability Approach* (London, Routledge, 2011) 2.

68 2004 6 BCLR 569 (CC).

civil and political rights.⁶⁹ Similarly, the Indian Supreme Court had established positive obligations such as prevention of malnutrition and starvation and the provision of life-saving medicines through the right to life provision in its Constitution.⁷⁰

The foregoing notwithstanding, in the midst of numerous pressures which governments face, it might appear unfair and unrealistic to hold governments responsible simply because a group's religious and cultural needs have not been fully met. We might be tempted to argue that the group would have to live with the consequence of their choice, which has nothing to do with the objectively formulated government policies. Even if the cultural and religious preferences of such group are in principle respected, a ready excuse might be presented perhaps that the embedding of Islamic microfinance principles would require some overhaul which might destabilize the financial system. Where such excuses are tendered, it would most likely be because of the perception that the vindication of individual preferences is not of the most important of the government's responsibilities. Such perception would endure so long as individual preferences and choices (not aggregated, the paternalistic idea of societal preferences) are dissociated from the relevant factors that determine the socio-economic welfare of society.

Even if the authorities appreciate the importance of individual preferences and choices in formulating socio-economic policies, they might pursue it with relatively lower vigour, especially when they are unsure of the potential economic consequence. Moreover, even if the government in power is fully convinced of the need to re-characterize its perception of socio-economic welfare by showing sensitivity to the individual preferences and choices of the people, such momentum could simply plunge when a new government arrives. Furthermore, if there is a clear duty that incumbent governments should have a clear Islamic microfinance strategy, a government without a political will could surely work around the grey ambits of the law to sabotage the intensity at which such policy is being embedded. To avoid such political shenanigans, it is imperative to set the minimum standard at which the positive duty of embedding Islamic microfinance would have to be pursued. Such standard would effectively diminish elements of political

69 See also *President of South Africa v Modderklip Broedery SA* 2005 (5) SA 3 (CC).

70 *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others* (1981) 1 SCC 608.

discretion that could be exercised unfavourably.

From the economic perspective, the claim for the infusion of Islamic microfinance principles, which reflects individual preferences and choices, can be articulated through the liberal concept of the Capability Approach (CA). However, to concretize its relevance for this task, effort would be made to align the relevant aspects of CA with Islamic microfinance through the language of rights. Thus, the next section would be dedicated to substantiating the CA as a contemporary economic welfare paradigm which meets the poverty alleviation drive in Nigeria and as such provides a firm basis for Islamic microfinance. The section will also seek to strengthen the legal basis for Islamic microfinance further by stressing the link between CA and international human right.

5. FUSING THE ECONOMIC AND LEGAL BASIS FOR ISLAMIC MICROFINANCE

As already noted, an economic paradigm in Nigeria is simply tailored to the neo-classical school which paternalistically prescribes a universal idea of 'the good' for every society.⁷¹ The theory suggests that policies should be based on measurable ideals and advocates against non-measurable standards as the basis for formulating economic policies.⁷² The preferred measurable metrics accepted by many proponents of this school of thoughts are money and wealth (unlike other standards such as happiness, preference, freedom and so forth). These preferences are based on the argument that the only measurable standards are those standards that can be objectively determined.⁷³ It also believes that wealth inherently drives every human being.⁷⁴ It should be noted though that some of its proponents recognize the value of societal welfare. However, they maintain their preference for the former by

71 On the paternalistic nature of neo liberalism, see J. Soss, R Fording and S. Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Illinois, University of Chicago Press, 2011).

72 R. Nadeau, 'Neoclassical Economic Theory' *The Encyclopaedia of Earth* <www.eoearth.org/view/article/154813/> accessed 20 September 2016.

73 See generally J. Klick and F. Parisi, 'Wealth, Utility, and the Human Dimension' (2005) 1(1) *NYU Journal of Law and Liberty* 590-608.

74 *ibid.*

contending that encouraging and facilitating the inherent selfishness of man could best attain overall societal welfare.⁷⁵ This is because, as they argue, self-seeking attitude is the 'rational choice' for the economic man.⁷⁶ The implication of this theory is that policymakers applying this ideal will be completely blinded to factors and issues that cannot be assigned some direct monetary value. Hence, justifying Islamic microfinance on the basis of perceived need to vindicate fairness and freedom (as reflected through preferences and choices) for the poor would appear to staunch neo-classicalists as unintelligent.⁷⁷ Even when such theorists find compelling evidence that disparages the monolithic neo-classical ideal (such as the resulting distributive injustice), they often explain things out through various bouts of misdiagnosis or they focus on other parts of the problem. Some of the problems that are often used as convenient distraction include claims of market failure, lack of public awareness, corruption, lack of technical expertise, etc. – everything but the paradigm is blamed. They then usually propose makeshift curative prescriptions.⁷⁸

However, though the neo-classical paradigm has dominated the global economic landscape for a long time, more responsive welfare approaches have also been developed. Particularly of note is the CA, which allows for a progressive framework for welfare analysis. It has been widely used especially by the United Nations as the framework for setting agendas and goals on issues concerning development and sustainability.⁷⁹ This approach is premised on the idea that wealth is not an end in itself. Rather, it is only needed to achieve something else.⁸⁰ The methodological focus of the CA thus necessarily results in a

75 J. Nelson, 'Poisoning the Well, or How Economic Theory Damages Moral Imagination' Institute for New Economic Thinking Research Note No17 (28 Oct 2012). Contrast this with C. Snowdon, *Selfishness, Greed and Capitalism: Debunking Myths about the Free Market* (London, Institute for Economic Affairs, 2015).

76 *ibid.*

77 See the argument in G. Zatzman and R. Islam, *Economics of Intangibles* (Nova Science Publishers, 2007)

78 Unfortunately, conventional microfinance is one of such palliatives.

79 UNDP, *Human Development Report: International Cooperation at a Crossroad – Trade and Security in an Unequal World* (New York, UNDP, 2005).

80 Amartya Sen 'Well-being Agency and Freedom' (1985) *Journal of Philosophy* 203; 'Capability and Well-being' in M Nussbaum and A Sen, *The Quality of Life* (Oxford, Clarendon Press, 1993).

distinct theoretical view, which, if applied, will result in policy prescriptions that are markedly different from those, influenced by utilitarianism.⁸¹

The CA is a flexible concept, which could be expressed and applied to various instances. The aspects of the CA that are most relevant for vindicating Islamic microfinance in Nigeria is its conception of welfare and the idea of 'the good', its broad methodological paradigm, and the way it facilitates inclusiveness. The remainder of this section will therefore briefly explain the CA and explore how it provides the economic basis for Islamic microfinance in Nigeria. Afterwards, an attempt will be made to link the more inclusive paradigm to human right thereby solidifying the legal argument for Islamic microfinance.

CA and Islamic Microfinance

The CA is a broad normative framework for the evaluation of individual well-being and social arrangements, the design of policies and proposals about social change in society.⁸² It is concerned with evaluating a person's advantage in terms of his or her actual ability to achieve various valuable *functioning* as a part of living. It is used for aggregative appraisals as well as for the choice of institutions and policies. It must, however, be noted that the capability approach does not constitute a goal in itself. The CA thus merely serves as a platform for juxtaposing the various interests and values. One of its strengths lies in its application in a wide range of fields. It can be used to evaluate a variety of aspects of people's well-being, such as individual well-being, inequality, and poverty.⁸³ In evaluating a person's advantage, CA focuses on what people are effectively able to do and to be. As would be shown presently, it places primary focus on individuals. Sen who stated that by focusing on what people can do and be and on the quality of their lives, we ensure for them more freedom to live the kind of life, which, upon reflection, they find valuable, founded the concept. He states that:

81 B. Herguner, In Pursuit of Equity: The Capability Approach and Education (2012) 2(5) *Public Policy and Administration Research* 22-28.

82 I. Robeyns, 'Capability Approach: A Theoretical Survey' (2005) 6 *Journal of Human Development* 94.

83 R. Hick, 'The capability approach: Insights for a new poverty focus' (2012) *Journal of Social Policy*.

[T]he capability approach to a person's advantage is concerned with evaluating it in terms of his or her ability to achieve various valuable functioning as a part of living. The corresponding approach to social advantage – for aggregative appraisal as well as for the choice of institutions and policy – takes the set of individual capabilities as constituting an indispensable and central part of the relevant informational base of such evaluation.⁸⁴

Well-being is thus to be assessed in terms of people's capabilities to function. Assessing people's 'achieved functioning' requires that we focus our evaluative exercise on their effective opportunities to undertake the actions and activities that they want to engage in, and to be the person they want to be. In reaching a finding about what a person seeks to be, CA recognizes 'that different people, cultures and societies *may* have different values and aspirations.'

We extend our focus to opportunities under the CA because it affords versatility; it is more general and more informationally inclusive than merely relying on achieved functioning. Sen argues that there is no loss in looking at the broader informational base of capabilities, which allows us not to rely merely on the valuation of achieved functioning. Rather, it also allows for evaluation on the basis of priorities such as opportunity and choice.⁸⁵

The implication of choice is that even where two persons have identical capability set, they are likely to choose different vectors from their effective options, especially where they have varied ideas on what constitutes a good life. Consequently, the two persons may end up with different types and levels of achieved functioning depending on the extent to which prevailing policies reflect the functioning chosen by each individual. Hence, emphasizing the need to respect the difference in opinion on what constitutes a good life, Sen argues that it is capability, not achieved functioning, which should be the appropriate political goal of institutions.⁸⁶

Addressed in the context of issues underlying the call for Islamic microfinance in Nigeria, we can categorize the different schemes run by the BOI, BOA, and the various microfinance banks as constituting

84 Sen (n 80) 30.

85 Amartya Sen, *The Idea of Justice* (Cambridge MA, Harvard University Press, 2009) 236.

86 *ibid.*

the capability set aimed at lifting the economically disadvantaged citizens out of the poverty trap. Each of the schemes can be termed a 'functioning'. Assuming there are two poor persons in need of funds. Let us assume further that both of them are economically active and that they are well informed about the various avenues open to them. It is possible that the two persons would perceive their capability set very differently such that the chosen vector of the functioning of each person varies completely. If one of the two is open to any form of a financing arrangement that has the prospect of lifting him out of the trap, then it is likely that such a person would have a full set containing all the options and might perhaps only rank the functioning based on the economic terms and conditions attached. However, if the another person applies a different standard in the assessment of the same capability set (i.e., Islamic standard), it may end up that in an apparent midst of plenty, they actually have no active functioning at all!

Regardless of the foregoing argument, if we view the schemes and palliatives presented by the government and private actors as the ultimate measure of opportunity, one would be hard-pressed to take account of the welfare implication that results from individual choices. A devout Hindu man's starvation is not solved by an excess supply of beef. It would also not be of any value to organize 'eat-in' lunch in a Muslim populated neighbourhood during the month of Ramadan. While hunger might, in general, be considered a sign of deprivation, the stomach that does not go hungry in the month of Ramadan without justifiable excuse, and the community may consider this as not only deprived of good but also depraved. In the same sense, microfinancing options that might appear juicy might in fact not appear as an option at all.

The foregoing reveals that any policy maker that denies the importance of choice, beliefs and culture and fails to recognize their impact on (perception of) welfare might be unable to escape culpability. This is why Sen stated that capabilities (as reflected in the true options that exist within the capability set), and not achieved functioning, should be the appropriate political goal of institutions.

It is imperative therefore that we understand the connection between well-being and individual freedom (as expressed through preference and choice). The idea of individual freedom, under the CA, contains two aspects: the opportunity aspect and process aspect. The opportunity aspect of freedom means that individuals should have more opportunities to pursue their objectives so that they can live, as

they would like and to promote the ends that they may want to advance. The process aspect requires that individuals be able to achieve what they value while also paying due regard to the process through which that achievement comes about. By providing concrete avenues for attaining welfare, authorities could very well claim to have met the 'opportunity' aspect of freedom. The process aspect, however, requires that the means of accessing the vector(s) of functioning should facilitate the attainment of well-being rather than hamper it.

The foregoing puts beyond doubt that the CA provides 'a strong justification for the promotion of interpersonal equity in the space of basic capabilities'.⁸⁷ Failure to meet this process aspect completely defeats the gains or claims that can be made regarding the opportunity aspect. In effect, it is grossly insufficient to initiate microfinance schemes (opportunity) when the process of obtaining it is so averse to a person (or group's) perception of welfare that the 'opportunity' is seen as toxic.

Nevertheless, a legitimate concern that might be expressed is that the multiplicity of interest in a society might lead to an infinite list. The broader the list, the more difficult it would be to justify why a specific functioning such as Islamic microfinance should be paid due attention. Theorists who acknowledge the huge opportunity costs of fulfilling some capabilities have addressed this concern. They have thus suggested that stakeholders should focus on sets of co-realizable capabilities.⁸⁸ It is contended that introducing Islamic microfinance is a co-realizable capability given that all that might need to be done is to set-up appropriate channels for assessing already existing schemes. Moreover, as earlier mentioned, the welfare-enhancing effect of Islamic microfinance, as revealed through the CA, has strong constitutional relevance. It would thus be appropriate to tie the CA to human right as this would help set the threshold for ascertaining whether claims are realizable.

CA and Human Right

The Universal Declaration of Human Rights codifies some human rights

87 D. Clark, 'Capability Approach' in D. Clark (ed) *Elgar Companion of Development Studies* (Cheltenham, Edward Elgar, 2006) 41.

88 B. Williams, 'Standard of Living: Interest and Capabilities' in G. Hawthorn (ed) *The Standard of Living* (Cambridge, Cambridge University Press, 1987) 98-100.

which states are obliged to fulfil or respect. Those rights can be categorized into two; civil and political rights and socio-economic and cultural rights. There are also rights such as equality and non-discrimination, which are considered to be free standing. The socio-economic and cultural rights are given more expression in the International Covenant on Economic, Social and Cultural Rights. Art 2.1 of the Covenant requires states to achieve the progressive realization of the identified rights to the 'maximum of available resources'. The vindication of these rights, it has been shown, helps to establish global responsibility towards poverty alleviation.⁸⁹

In similar light, Sen's Capability Approach provides an economic welfare approach that equally attempts to arrest the spate of global poverty through the 'human development paradigm'. There is thus a visible link between human right-influenced global responsibility on poverty alleviation and the CA-influenced human development paradigm.⁹⁰ More so, it has been empirically established that human right protection constitutes a key public policy variable that can significantly influence the capabilities of individuals and groups.⁹¹

The synergy between human right and CA led to a call for a 'human rights-based development paradigm' which gives rise to the Right to Development.⁹² The ultimate goal of this right, according to Sengupta, is to expand substantive freedoms rather than focus on narrow informational metrics such as utility or growth. The CA's influence on human right is that it gives relevance to perspectives, which helps to isolate (inconspicuous) human right challenges. For example, the right to education might be implemented through a free education scheme, but the right may then be shown to be breached where no concrete action is taken against child labour. This unique HR perspective is established by paying attention to the effect of the right on the substantive position of individuals and groups. The effect can be tested

89 M. Salomon, *Global Responsibility for Human Rights* (Oxford, Oxford University Press, 2007).

90 Sen noted that 'process-freedoms' and 'opportunity-freedoms' that meet a threshold of 'importance' can be termed as human rights. He also recognised that many human rights can be explained through capabilities. See Sen (n 86) 367-372.

91 A. Sengupta, 'Poverty Eradication and Human Right' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford, OUP, 2007).

92 *ibid.*; Vizard et al (n 67), 10.

by assessing how a measure affects the cultural practices and norms of a person or group.⁹³

The foregoing has a direct relevance to the argument for an Islamic microfinance in Nigeria. The link between microfinance and human development is well established.⁹⁴ The special case for Islamic microfinance as a necessary ingredient for human development has also been detailed in preceding sections of this article. The excluded group of Muslims would have felt the positive impact if the relevant public authorities are held duty bound to introduce Islamic microfinance as a means of reversing the systemic (intentional or non-intentional) discrimination and equalizing the inequalities embedded in the status quo. However, the foregoing notwithstanding, the concern remains that even if stakeholders recognize the welfare implication as well as the legal duty to establish Islamic microfinance, it might be difficult to hold any one governmental agency accountable for breach. This is where the human-right-based development paradigm can help avoid any potential accountability deficit.⁹⁵

Codifying the Principles of Islamic Microfinance

As established above, poor Muslim groups have a right to access finance through Islamic microfinance to realize their welfare needs. The vindication of this right is also important because of the equality and discrimination concerns that arise in the absence of suitable financing avenues. Given the seriousness of the issue surrounding Islamic finance, the weight of responsibility on the government would be centred on the result they achieve rather than the mere efforts made. However, unless the scope of responsibility is specifically identified and carefully delineated, it will be easy to evade accountability by either passing the buck or simply hiding behind empty policy statements that allude to Islamic finance principles.

93 M. Nussbaum, *Martha Women and Human Development: Then Capabilities Approach* (Cambridge: Cambridge University Press, 2000) 135-147.

94 M. Arouri, et al, 'Microfinance: A Powerful Tool for Human Development in Africa' in A. Soucat, and N. Mthuli (eds) *One Billion People, One Billion Opportunities* (Tunis, African Development Bank, 2014) ch 26; S. S. Kanungo 'Microfinance: A Tool for Human Development' (2015) 2(2) *Journal of Innovative Professional Science & IT* 78-87.

95 Accountability and obligation are integral parts of a human right model. See Vizard et al (n 67).

It might be necessary to codify the Islamic finance principles either within the financial laws and guidelines or through some other avenues. The codification must, in effect, cement Islamic microfinance principles into the national socio-economic fabric. To aid the operation of these principles, it is imperative to specify the parameters for its application, the conditions that must be satisfied, the government agency responsible, the timeframe for implementation, and standard through which implementation efforts can be assessed.⁹⁶

6. POLICY REVIEWS FROM ISLAMIC MICROFINANCE PERSPECTIVE

Following the effort to establish the imperativeness of Islamic microfinance policies, this section will attempt to analyse some of the government-funded schemes to identify how they fail to comply with sharia principles. An attempt will also be made to explore how these schemes could meet sharia requirements without having to overhaul their modalities totally.

Analysis of BOI's Bottom of the Pyramid (BOP) Scheme

One of the micro-financing schemes funded by the national government is the BOP. With the overall aim of enhancing financial inclusion, the scheme aims to reduce poverty through job and wealth creation. While the government provides the fund, the administrative services are rendered through private MFIs. To be eligible as a channel for administering the scheme, the MFIs must meet a certain minimum capital adequacy, non-performance loan, and liquidity thresholds. They must also have been in operation for not less than three years and so forth. It is estimated that the scheme will result in the creation of at least of 40,000 direct and 120,000 indirect jobs at an average loan size of N250,000.00 per ultimate obligor. The interest rate from the BOI to MFIs is set at 1.0 percent per month while the MFIs are to charge beneficiaries 1.5 percent per month flat (all inclusive). The tenure of the loan is two years with three months moratorium. The

96 M. Nussbaum, 'Capabilities and Constitutional Law: 'Perception' against Lofty Formalism' (2009) 10(3) *Journal of Human Development and Capabilities* 341-357.

borrower is expected to obtain a Bank Guarantee from reputable commercial banks.

As straightforward as this scheme might appear to be, there are many aspects that could potentially repel an impoverished Muslim from tapping into the 'opportunity'. The most conspicuous of the concerns is the requirement of interest. As already noted, to understand why this might be such a big issue to Muslims, one just needs to understand how much interest (*riba*) is abhorred in the Quran.⁹⁷ The Quran makes it clear that the one who consumes⁹⁸ interest has declared war against God!⁹⁹ Such implication would surely make many poor Muslims flee from this scheme. Moreover, the scheme requires borrowers to obtain guarantees from commercial banks. Bank guarantees are often issued at a fee or commission. This also offends the tenet of Islam, firstly because of the interest element and secondly because it involves the sale of uncertainty (*gharar*).¹⁰⁰ It also contains an element of gambling (*maysir*).¹⁰¹ It is noteworthy that while pure loans and guarantee are not in principle forbidden in Islam, it has to be done benevolently as any unearned increase will render such transaction toxic. It is also noteworthy that while interest (and the like) is forbidden, Islam promotes trade.¹⁰² Such poor Muslims are thus more likely to view a trade or partnership arrangement more favourably.

One can only imagine how a group could be easily excluded from benefitting from some of the estimated impact of the scheme. Moreover, while it might be argued that there is nothing preventing the establishment of Islamic MFIs (IMFIs) by private parties, the prevailing

97 E.g. Quran 2:275 states thus: '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 Allah 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 Allah. But whoever returns to [dealing in interest or usury] – those are the companions of the Fire; they will abide eternally therein.

98 'Consumption' is attributed not only to the one who demands interest, but also the one who pays it. The prophetic tradition shows that they are the same.

99 And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal - [thus] you do not wrong, nor are you wronged.

100 This is contained in Quran 2:188; 4:29.

101 See Quran 2:219, 5:90, 91.

102 Quran 2:275.

system could easily dis-incentivize prospective MFIs. For example, this scheme requires the MFIs to pay interest.

Clearly, to properly address the present problem, the authorities would have to establish conditions that are free from the violations mentioned above. However, setting out policies would not be enough. Even this basic BOP scheme contains an element that might hamper the full implementation of the scheme even if the eligibility criteria were in compliance with sharia. Thus, if the proposition in this article is adopted and public schemes have sharia-compliant variations, the variant might be dead on arrival if some of the conditions are not altered accordingly. For instance, one of the eligibility requirements is that MFIs must have been in operation for three years.

It also requires that some minimum ratios are met. It might be that only very few MFIs would meet these requirements. Such practical detail, which has dire consequence for financial access, can be easily overlooked even where it appears that Islamic finance has been adopted as a matter of state policy. An integral element of a public agent's duties, therefore, is to unblock and remove every conceptual and operational hurdle that might be in the way of implementation. For example, this might be achieved by granting concessions to newly formed MFIs who do not meet the 3-year benchmark. The apparent 'special treatment' might be necessary to ensure equitable access and distribution. In this case, it would be wrong to insist that the same conditions should apply to all the financial intermediaries (MFIs and IFMIs). Equity (not equality) should be the benchmark.¹⁰³

Analysis of the Nigerian Incentive-Based Risk Sharing in Agricultural Lending (NIRSAL) Loan Guarantee Scheme

The Nigerian government recently initiated a N75 billion guarantee scheme to facilitate the revival of the agricultural sector. The scheme will guarantee between 30-75 per cent loans provided by Deposit Money Banks (DPB) to farmers. The scheme enables farmers to obtain credit by 'integrating end-to-end agriculture value chains, such as input producers, farmers, agro-dealers, agro-processors and industrial manufacturers with agricultural financing value chains – loan product

103 K. Cook and K.Hegtvædt, 'Distributive Justice, Equity, and Equality' (1983) 9 *Annual Review of Sociology* 217-241.

development, credit distribution, loan origination, managing and pricing for risk, and loan disbursement.¹⁰⁴ The scheme is designed around NIRSAL's five pillars, with a particular focus on Risk Sharing and Technical Assistance. The scheme is primarily aimed at changing the behaviour of financial institutions while the benefit is targeted at individuals in paid employment, micro (small) farmers, medium and large-scale farmers, corporate organizations, NGOs, government, and its agencies. In light of the overall trajectory of this article, the scheme will be addressed to the extent that it relates to micro (small) farmers. The expectation is that the scheme will result in increased food production and national security, poverty reduction, employment generation and wealth creation, empowerment of farmers and rural households through credits and savings, strengthening the governance structure of co-operatives and so forth.

Such a scheme truly has the potential to expand the reach of financial services especially to otherwise excluded groups. However, it is difficult to see how poor adherent Muslims will maximize their capability through this scheme. The guarantee covers loans provided by DPBs. There are about 23 DPBs in Nigeria with only one of them being an Islamic bank and it has very limited reach compared to even the smallest of the conventional banks. In effect, while the scheme could in principle cover sharia-compliant transactions, many (perhaps most) of the potential Muslim borrowers would be unable to overcome the extra burden they might have to face – burden that would not be encountered by their contemporaries who are willing to approach any of the numerous branches of the 22 conventional banks.

The preceding scenario reveals the level of sensitivity needed for government agencies to fulfil their positive obligation towards financially excluded Muslim adherents. This is a responsibility that cannot be compromised. In implementing this scheme, there is no clear condition that violates the principle of Islamic finance, yet the scheme offends the right to Islamic microfinance because it fails to promote access to Sharia-compliant microfinance – a failure of a positive duty arising from the fundamental right nested on the principles of human dignity, equality/equity, and non-discrimination.

104 Jude Uzonwanne, the Head of NIRSAL Project Implementation Office under the Development Finance Department of the CBN. See *Premium Times*, 'CBN approves N75 billion loan for agricultural lending in states, Abuja' 13 June 2012.

To correct the oversight, participating DPBs could be required to administer sharia-compliant credit transactions to small businesses and individuals who choose such avenues. If this option is considered impractical, the government could open the scheme to MFIs who are willing to operate sharia-compliant scheme for interested clients.

7. CONCLUSION

There has been a continuous call for equity by key stakeholders especially since the turn of the century. Among institutions that have made a similar call are the United Nations, through its *Human Development Report* (UNDP, 2005); and the World Bank, through its *World Development Report* (2006). By and large, stakeholders and commentators have often identified the specific need for equity in developing countries. The reason behind the attention given to equity is because it is considered good in its own right. Secondly, equity is a necessary measure of development and social change. Thirdly, it is an important instrument for reducing poverty and effecting long-term change and social cohesiveness.

The paper has sought to establish inequity and consequential breach of right that result from the absence of Islamic microfinance policies in Nigeria. Particular focus was placed on the absence of sharia-compliant avenue for government funded schemes. This article has established the existence of people's right to Islamic microfinance through a constitutional analysis. It goes further to establish an equitable economic approach (the CA), which helped to clearly substantiate the problem with the status quo in Nigeria.

Going forward, concerted efforts should be made to develop the modalities for operating a Sharia-compliant microfinance scheme. An ideal starting point is to emphasize that every transaction that does not include prohibited elements as determined by sharia is 'Islamic'. Therefore, from the perspective of a Muslim, a legitimate trade between non-Muslim is Islamic while illegitimate transaction engaged in by Muslims is un-Islamic even if it is cloaked with Arabic terms and branded as sharia-compliant. Also, it must be noted that not all sharia-compliant instruments and methods will be sustainable and suitable for every situation and location. For this reason, it would be necessary to conduct an ethnographic research of Muslim communities/households to get a sense of the most suitable instruments and methods for the Nigerian market.

That said, it is worthy to mention broadly that Islamic microfinance may be developed on a non-profit or for-profit basis.¹⁰⁵ It could also be on the basis of a composite model that combines profit and non-profit elements.¹⁰⁶ In general, experience in other countries indicates a preference for three specific instruments: murabahah, mudarabah and qardhasan.¹⁰⁷ The suitability of any model will depend on the end sought, the circumstance, and the parties involved.

Murabaha microfinance is a trade transaction whereby a potential beneficiary approaches bank with the intention of obtaining certain commodities, i.e., the customer needs a tractor for his farm to expand. The bank reviews the request taking account of all the risk factors. If they are satisfied, the bank buys the tractor and sells to the customer at an agreed price, which is usually higher than the cost price. The bank's profit is the margin between the cost price and the sale price. Parties can then agree on a repayment plan. The sale price must not be subject to upward or downward review, and it must be clear that ownership of the commodity has been transferred to the customer. It is permissible to provide collateral. However, the reality in many cases is that the person in need of microfinance will hardly possess the required collateral. While such a person can obtain a guarantee, it would not be acceptable to purchase such credit guarantee. A viable option that has been deployed is only to extend such credit sale to members of recognized groups whereby group members jointly guarantee each other.¹⁰⁸ Such transaction is valid so long as the underlying commodity is not prohibited and the terms meet the requirement of effort, risk, and reward.¹⁰⁹

Some of the microfinance arrangements in Nigeria can be easily modified to fit with the murabaha model. For example, some loan providers do not hand over the loan amount to clients. Rather, they purchase the commodity and then convert its value to the loan amount.

105 See generally M. Obaidullah, *Introduction to Islamic Microfinance* (IBF Net, 2008).

106 B. Shafique, 'Models of Islamic Microfinance' (2013) Global Islamic Finance Report ch 11.

107 R. Dhumale, and A Sapcanin, *An Application of Islamic Banking Principles to Microfinance: Technical Note* (UNDP, 1999).

108 See Obaidullah (n 106).

109 For the sharia requirements of Islamic finance, see S. A. Rosly, *Critical Issue on Islamic Banking and Financial Markets* (Bloomington, Authorhouse, 2005).

With their experience in the commodity market, such organization can be engaged in operationalizing a murabaha model. The credit risk may be mitigated by requiring the applicant to provide a third-party guarantee (e.g. group guarantee) and post-dated cheques.¹¹⁰

The government agencies can easily adapt the mudarabah (partnership) model. Typically, the BOA already applies some loan eligibility criteria that would have enabled them to gain a level of expertise required for the partnership arrangement. The BOA scheme requires applicants to open an account with them. They also require that the account must be functional for at least three months. Also, applicants would have to keep proper daily farm records. The bank official will also interview applicants who would have to display proper knowledge of their section of the agricultural sector and must be fully conversant with their farm. The bank officials will then visit the applicant's farm to assess the suitability of the grant.

With the level of experience explained above, there is no reason why BOA should not maintain a scheme that allows for them to act as the Rub ul Mal (fund provider) while the applicant acts as the mudarib (entrepreneur) within a partnership arrangement. The credit guarantee scheme may mitigate the risk element for BOA. The risk borne by the BOA could also be reflected in the profit sharing ratio between the parties. Similarly, in its engagements with IMFIs regarding the BOP scheme, the BOI engage in a musharaka or mudaraba arrangement rather than extending the fund as loans. Such IMFI as the active partner can then engage in a credit sale on a murabaha basis with beneficiaries.

Sceptics might be unsure about the viability of such microfinancing arrangement, but experience in other countries alludes to the soundness of Islamic microfinance models. For example, a scheme funded by the Islamic Development Bank (IsDB) in the Guinea Republic shows the relevance of Islamic microfinance to human development. Many of the people who engaged in the scheme would not have considered conventional loans at all.¹¹¹ Working in partnership with local MFIs, IsDB was able to enlighten the people about the available opportunity. The scheme was particularly successful because of the

110 The Sudanese Bank used this approach successfully. See Islamic Research and Training Institute, *Islamic Social Finance Report 2015*, 95.

111 IsDB, 'Microfinance makes Businesses Successful in Guinea' (May 2013) 13 Success Stories Series, 2.

ability of these MFIs to reach out to the public through media channels primarily the radio.

Parallel to embedding Islamic microfinance principles into governance practice, it is equally important that all stakeholders enhance the prospect of Islamic microfinance in Nigeria by engaging closely with community leaders and religious scholars who would be instrumental in convincing the people as to the permissibility of such funding avenues.

It is hoped that the paper will signal the beginning of a drive towards deepening human development while at the same time paying attention to the socio-economic balance in the country.