

This $fatw\bar{a}$ seeks to clarify the $shar\bar{i}$ a perspective on the permissibility of pensions; both personal pensions as well as occupational pensions (defined income as well as defined contribution).

Given the complexity of the area, the paper looks firstly at some pertinent shar \bar{i} a issues. These relate to:

- 1. Employment law
- 2. The potential of gharar (gross uncertainty) in contract clauses
- 3. The central issue of ownership of a pension without possession.

Having dealt with these prerequisite issues, this document opines on the permissibility of pensions.

The $fatw\bar{a}$ concludes that, whilst strict analogy would require that defined income pensions are deemed to be impermissible on account of the inherent uncertainty involved, ¹ juristic preference ($istihs\bar{a}n$) allows them to be deemed permissible due to prevalent practice and the absence of dispute amongst the parties. ² Defined contribution pensions can also be deemed to be permissible if the underlying investments are $shar\bar{i}'a$ compliant. The $fatw\bar{a}$ also addresses the permissibility of annuities and other alternatives.

The $fatw\bar{a}$ then concludes with some suggestions to pension providers and regulators on how to amend existing pension schemes and regulations so as to achieve a pension contract which would be entirely valid - $\bar{s}a\bar{h}\bar{t}h$ from a $shar\bar{t}a$ perspective.

Contract of Employment

A contract of employment is a form of *ijāra [ijāra al-ʿamal – lit.* lease of labour]. The primary cornerstone (*rukn*) of *ijāra* is verbal offer and acceptance indicating the same.³

An $ij\bar{a}ra$ contract maybe either valid $(sah\bar{i}h)$, void $(b\bar{a}til)$, or defective $(f\bar{a}sid)$. A valid $ij\bar{a}ra$ contract is that which is legal in both its fundamental and ancillary components. A defective $ij\bar{a}ra$ contract is that which is fundamentally legally sound but that has a forbidden characteristic, such as the absence of sufficient clarity, or an incongruse condition. A void $ij\bar{a}ra$ contract is that which is illegal in its fundamental and ancillary characteristics, such as that which is contracted for a purpose that does not have legal sanction, such as a contract to make statues, or that is in return for an unlawful consideration, such as carrion or blood.⁴

The effect of a defective $ij\bar{a}ra$ contract is that it necessitates fair monetary remuneration ($ajr\ al-mithl$), i.e., the aggregate market rate, as opposed to the agreed remuneration ($al-ajr\ al-musamm\bar{a}$) unless the agreed remuneration is the lesser of the two. Such remuneration is also ritually pure (tayyib) for the employee. A void $ij\bar{a}ra$ contract does not earn any remuneration.⁵

¹Previous versions of this paper first published in 2008 concluded, in accordance with strict analogy that, due to the inherent uncertainty involved, defined income pensions are impermissible and the pension holder incurs sin, even if the income itself can sometimes be deemed to be ritually pure (*tayyib*). The rationale to this conclusion has also been explained in this earlier paper.

² Recourse to juristic preference has been made further to the author raising the matter around two years ago in a private discussion with Muftī Muḥāmmad Taqī 'Usmānī, who concurred that prevalent practice and the absence of dispute amongst the parties allowed such recourse. Since then Al-Qalam has been advising correspondents that defined income schemes are permissible, although amendments to the previous paper have been made just now.

³ ففي بدائع الصنائع: أما ركنها فالإيجاب والقبول وذلك بلفظ دال عليها. [كتاب الإجارة، 174/4، ط. مكتبه رشيديه]

4 ففي الدر المختار: (الفاسد) من العقود (ما كان مشروعا بأصله دون وصفه، والباطل ما ليس مشروعا أصلا) لا بأصله ولا بوصفه. [كتاب الإجارة، باب الإجارة الفاسدة، 45/6، ط. أيج أيم سعيد كمبني]

وفي رد المحتار: قوله: (دون وصفه) وهو ما عرض عليه من الجهالة أو اشتراط شرط لايقتضيه العقد حتى لو خلا عنه كان صحيحا. ط. قوله: (والباطل) كأن استأجر بميتة أو دم أو استأجر طيبا ليشمه أو شاة لتتبعها غنمه أو فحلا لينزو أو رجلا لينحت له صنما. ط. قوله: (ولا بوصفه) لأنه حيث بطل الأصل تبعه الوصف قوله: (وجوب أجر المثل) أى أجر شخص مماثل له في ذلك العمل. [كتاب الإجارة، باب الإجارة الفاسدة، 45/6 ط. أيج أيم سعيد كمبني]

⁵ فغي الدر المختار: (وحكم الأول) وهو الفاسد (وجوب أجر المثل بالاستعمال) لو المسى معلوما. ابن كمال. (بخلاف الثاني) وهو الباطل فإنه لا أجر فيه. [كتاب الإحارة، باب الإحارة الفاسدة، 45/6، ط. أيج أيم سعيد كمبني]

One of the conditions for a valid $ij\bar{a}ra$ contract is that the remuneration for the labour must be known property of value. The basis of this condition is the Ḥadīth: "Whoever hires a labourer should inform him of his remuneration." [Al-Muṣannaf li Ibn Abī Sheyba]⁶ Thus, an employment contract must clearly specify the amount of remuneration. In the case of a non-specific good, that can exist as a liability in general commutative contracts – ' $uq\bar{u}d$ mu' $\bar{a}wada$ such as minted silver and gold coins, currency, or fungibles that are traded by volume, length or weight or that are counted out and have similar characteristics, the amount of remuneration is specified by specification of genus, type, characteristics, and quantity as appropriate.⁷

Minor and gross uncertainty

Most commutative contracts involve some element of uncertainty; however, uncertainty *per se* is not prohibited. Rather, it is only gross uncertainty, characterised by the propensity to give rise to dispute, that renders a commutative contract defective. Thus, minor uncertainty that is tolerated according to market norm is tolerated. This precept can be demonstrated by a few examples in classical Islāmic jurisprudence:

- 1. If a heard owner employs the services of a shepherd to tend to an agreed head of sheep, the shepherd is not required to tend to any of its subsequent offspring, as offspring is considered an additional head after birth. If the agreement requires the shepherd to deliver and then tend to the newborn lamb, according to analogy, this would render the contract defective. The amount of work required is uncertain due to uncertainty regarding the gender and number of lambs to be born. However, Imām Abū Ḥanīfa raḥimahullāh has allowed it on the basis of juristic preference (istiḥsān), as firstly, it is the prevalent practice, and secondly, the uncertainty here does not give rise to dispute between the two parties.⁸
- 2. If one employs a labourer in consideration of a fixed sum + food, or one hires a mount for a fixed sum + it's feed, the contract is defective by strict analogy as the food and feed, respectively, constitute an unspecified portion of the remuneration leaving the sum of the total remuneration uncertain. Similarly, if one employs a cook to cook and bake in consideration of food and clothing, the contract is defective by strict analogy as the total remuneration is uncertain. According to strict analogy, hiring a wet-nurse in consideration for her food and clothing is also defective according to Imām Abū Yūsuf and Imām Muḥammad, as the remuneration of food and clothing entails uncertainty. However, Imām Abū Hanīfa has allowed it on the basis of juristic preference due to textual evidence that does not differentiate in this regard between a mother who remains in matrimony and a divorcee. The Holy Qurʿān states:

... and incumbent upon for whom the child is born [father]is their [mothers'] food and their clothing on a reasonable basis. ...

وفيه: (لم يزد) أجر المثل (على المسمى) لرضاهما به (وينقص عنه) لفساد التسمية. [كتاب الإجارة، باب الإجارة الفاسدة، 49/6، ط. أيج أيم سعيد كمبني]
وفي رد المحتار: قوله: (وجوب أجر المثل) أي: أجر شخص مماثل له في ذلك العمل. والاعتبار فيه لزمان الاستفجار ومكانه من جنس الدراهم والدنانير لا من جنس المسمى لو كان غيرهما. ولو اختلف أجر المثل بين الناس فالوسط. والأجر يطيب وإن كان السبب حراما كما في "المنية". "قهستاني". ونقل في "المنيح" أن شمس الأثمة الحلواني قال: تطيب الأجرة في الأجرة الفاسدة إذا كان أجر المثل. وذكر في المسألة قولين وأحدهما أصح فراجع نسخة صحيحة. [كتاب الإجارة، باب الإجارة الفاسدة، 45/6، ط. أيج أيم سعيد كمبني]

6 ففي المصنف لابن أبي شيبة: 21102 - حدثنا أبو بكر، قال: حدثنا وكيع، عن سفيان، عن حماد، عن إبراهيم، عن أبي هريرة وأبي سعيد، قالا: من استأجر اجيرا فليعلمه أجره. [كتاب البيوع والأقضية، من كره أن يستعمل الأجير حتى يبين له أجره، 371/4، دار الكتب العلمية]

7 ففي بدائع الصنائع: وأما الذي يرجع إلى ما يقابل المعقود عليه، وهو الأجرة، والأجرة في الإجارات معتبرة بالثمن في البياعات؛ لأن كل واحد من العقدين معاوضة المال بالمال، فما يصلح ثمنا في البياعات يصلح أجرة في الإجارات وما لا فلا. وهو أن تكون الأجرة مالا متقوما معلوما وغير ذلك مما ذكرناه في كتاب البيوع. والأصل في شرط العلم بالأجرة قول النبي صلى الله عليه وسلم: { مَنْ السُنَا خَرَ أَجِيرًا فَلْمِهْلِمْهُ أَجْرَهُ }، والعلم بالأجرة لا يحصل إلا بالإشارة والتعيين أو بالبيان. ... وإن كان بغير عينه، فإن كان ثما يثبت دينا في الذمة في المعاوضات المطلقة كالدراهم والدنانير والمكيلات والموزونات والمعدودات المتقاربة والثياب لايصير معلوما إلا ببيان الجنس، والنوع من ذلك الجنس، والصفة والقدر، إلا أن في الدراهم والدنانير إذا لم يكن في البلد إلا نقد واحد لا يحتاج فيها إلى ذكر النوع والوزن ويكتفي بذكر الجنس ويقع على نقد البلد ووزن البلد. وإن كان في البلد نقود مختلفة يقع على النقد الغالب. وإن كان فيه نقود غالبة لا بد من البيان. إن لم يبين فسد العقد. [كتاب الإجارة، فصل وأما شرئط الركن فأنواع، ط. مكتبه رشيديه]

8 ففي المبسوط للسرخسي: وإذا ولدت الغنم لم يكن له عليه أن يرعى أولادها معها؛ لأن الولد بعد الانفصال في عمل الرعي كشاة أخرى. فإن كان اشترط عليه حين دفع الغنم إليه أن يولدها ويرعى أولادها معها فهو فاسد في القياس؛ لأن المعقود عليه هو العمل فلا بد من إعلامه، وإعلامه ببيان محله، وهنا محل بحهول؛ لأنه لايدري ما تلد منها وكم تلد، وجهالة المعقود عليه مفسدة للعقد. لمخارث المنازعة فهي لاتؤثر في العقد. [كتاب الإجارات، ولكنه استحسن ذلك فأجازه؛ لأنه عمل الناس ولأن هذه الجهالة لاتفضي إلى المنازعة بينهما، والجهالة بعينها لاتفسد العقد. فكل جهالة لاتفضي إلى المنازعة فهي لاتؤثر في العقد. [كتاب الإجارات، با إجارة الراعي، 185/15، ط. دار الفكر]

Similarly, after the death of the father, the legal [uterine] heirs of the child are also mandated to provide food and clothing for the now bereaved mother in a like manner:

And incumbent upon the inheritor is the like of that [which was incumbent upon the father].

And further:

And if you intend on seeking a foster-suckling mother for your children, there is no blame on you, provided you pay (the mother) what you agreed to give her on a reasonable basis.

In this latter portion of the verse, All $\bar{a}h$ I has removed any sense of blame in the employment of the services of a wet-nurse in general terms.

While it is correct to contend that the remuneration here is uncertain, it is not uncertainty *per se* that renders a contract defective, but only that which gives rise to dispute. In this instance, uncertainty does not give rise to dispute as wet-nurses are normally afforded generosity and munificence. The uncertainty that exists here is akin to that which exists in the sale of a specified unit of grain [or other similar commodity] from a pile. In the latter case, there is uncertainty as to what specific portion of the pile constitutes the object of sale, and the vendor may take from any part of the pile. However, such uncertainty does not give rise to dispute and is thus tolerated. With regards to employing the services of a cook in consideration of food and clothing, the uncertainty that exist here does give rise to dispute, as in this instance, it is customary to haggle and bargain and be as unyielding as possible.

Therefore, the principle established here is that minor uncertainty, characterised by that which does not give rise to dispute, is tolerated in commutative contracts. Thus, if one is employed for a fixed consideration + an unspecified amount that typically does not give rise to dispute, or one is employed according to market norm for an unspecified consideration that typically does not give rise to dispute, the contract will be valid.⁹

Pensions and uncertainty

There are principally five key elements of an employee's salary, some of which determine the rate of pension to be received.

- 1. Nett wages received by the employee from his employer as remuneration for services rendered.
- 2. Employee's National Insurance contributions
- 3. Employee's contribution towards the pension scheme.
- 4. Employer's contribution towards the pension scheme

9 فغي بدائع الصنائع: ولو استأجر عبدا بأجر معلوم وبطعامه، أو استأجر دابة بأجر معلوم وعلفها، لم يجز؛ لأن الطعام أو العلف يصير أجرة، وهو مجهول، فكانت الأجرة مجهولة. والقياس في استئجار الظر بطعامها وكسوتما أنه لايجوز. وهو قول أبي يوسف ومحمد لجهالة الأجرة، وهي الطعام والكسوة، إلا أن أبا حنيفة استحسن الجواز بالنص، وهو قوله عز وجل: {وَعَلَى الْمَؤُلُودِ لَهُ رِزُقُهُنَّ وَكِسُوتُهُنَّ بِالْمَعُرُوفِ} من غير فصل بين ما إذا كانت الوالدة منكوحة أو مطلقة، وقوله عز وجل: {وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ} [البقرة: 233] أي: الرزق والكسوة، وذلك يكون بعد موت المولود له، وقوله تعالى: {وَإِنْ أَرْدُمُ اللهُ وَسُعُولُ اللهُ وَلاَدُكُمُ فَل جُمَاحَ عَلَيْكُمْ إِذَا سَلَمْتُمُ مِا آتَيْتُمْ بِالْمَعُرُوفِ} نفي الله سبحانه و تعالى الجناح عن الاسترضاع مطلقا. وقولهما: الأجرة مجهولة مسلم لكن الجهالة الاتمنع صحة العقد العينها، بل الإفضائها إلى المنازعة، وجهالة الأجرة في هذا الباب لانفضي إلى المنازعة؛ لأن العادة جرت بالمسامحة مع الأظآر والتوسيع عليهن شفقة على الأولاد، فأشبهت جهالة القفيز من الصبرة. [كتاب الإجارة الفاسدة، 26/6) ط. مكتبه رشيديه]

وفي الدر المختار: (و) كذا (بطعامها وكسوتما) ولها الوسط، وهذا عند الإمام لجريان العادة بالتوسعة على الظئر شفقة على الولد. [كتاب الإجارة، باب الإجارة الفاسدة، 73:9، ط. أيج أيم سعيد

وفي رد المحتار: (قوله لجريان العادة إلخ) جواب عن قولهما لاتجوز؛ لأن الأجرة مجهولة. ووجهه أن العادة لما حرت بالتوسعة على الظئر شفقة على الولد لم تكن الجهالة مفضية إلى النزاع، والجهالة ليست بمانعة لذاتحا، بل لكونما مفضية إلى النزاع. [كتاب الإجارة، باب الإجارة الفاسدة، 73/9، ط. أيج أم سعيد كمبني]

وفي تبيين الحقائق: قال رحمه الله: (وبطعامها وكسوته) هذا عند أبي حنيفة رحمه الله. وقالا: لايجوز، وهو قول الشافعي، وهو القياس؛ لأن الأجرة مجهولة، فصار كما إذا استأجرها بحما للطبخ والخبز. وله أن الجهالة هنا لاتفضي إلى المنازعة؛ لأن العادة جرت بالتوسعة على الأظآر شفقة على الأولاد ولايشاححها بل يعطيها ما طلبت ويوافقها على مرادها. والحهالة إذا لم تفض إلى المنازعة المجريات المماكسة والمضايقة فيها. وفي المحيط: لو شرطت طعامها وكسوتما عند ستة أشهر وشرطت دراهم مسماة عند الفطام ولم تضف شيئا من ذلك جاز استحسانا من غير بيان عند أبي حنيفة رحمه الله، والمعنى ما بيناه. [كتاب الإجارة، باب الإجارة الفاسدة، 123/6، دار الكتب العلمية]

5. Income Tax

1. Wages received

The nett wages received by the employee from his employer as remuneration for services rendered are known. Complete¹⁰ proprietorship of the same is realised by the employee upon reciept.

2. Employee's National Insurance contributions

Ownership of remuneration is realised even before possession is acheived. However, in the absence of possession, such ownership is deemed to be defective. Complete ownership is realised only upon actual or constructive possession. Prior to possession, and despite the realisation of ownership, the employee is not empowered to transact with the remuneration due to him, except with the employer, or by authorising a third party to take possession as his agent, or through the assignment of debt [hawāla] This restriction is imposed due to the risk that the remuneration does not ultimately transfer to the employee. If the remuneration is a specific, tangible good, ownership restricts others from the right of disposal, whilst complete proprietorship empowers the proprietor to effect disposal. If the remuneration remains a debt in the form of a non-specific item such as money, then whilst ownership is established in favour of the employee to the extent due, it cannot be assigned to specific, identified units of money. Thus, the employer retains his right of disposal until possession is realised by the employee.

ففي بدائع الصنائع: (فصل): وأما حكم الإجارة ... أما الأول: فهو ثبوت الملك في المنفعة للمستأجر، وثبوت الملك في الأجرة المسماة للآجر؛ لأنما عقد معاوضة إذ هي بيع المنفعة، والبيع عقد معاوضة، فيقتضي ثبوت الملك في العوضين. وأما وقت ثبوته فالعقد لا يخلو إما إن كان عقد مطلقا عن شرط تعجيل الأجرة، وإما أن شرط فيه تعجيل الأجرة أو تأجيلها. فإن عقد مطلقا فالحكم يثبت في العوضين في وقت واحد، فيثبت الملك للمؤاجر في الأجرة وقت ثبوت الملك للمستأجر في المنفعة، وهذا قول أصحابنا. ... وأما كيفية ثبوت حكم العقد فعندنا يثبت شيئا فشيئا على حسب حدوث محله، وهو المنفعة؛ لأنما تحدث شيئا فشيئا. [كتاب الإجارة، 201/4 ، ط. مكتبه رشيديه]

وفي الدر المختار: وحكمها: وقوع الملك في البدلين ساعة فساعة. [كتاب الإجارة، 5/6، ط. أيج أيم سعيد كمبني]

وفي رد المحتار: (قوله ساعة فساعة) لأن المنفعة عرض لا تبقى زمانين. فإذا كان حدوثه كذلك فيملك بدله كذلك قصدا للتعادل، لكن ليس له المطالبة إلا بمضى منفعة مقصودة كاليوم في الدار والأرض والمرحلة في الدابة كما سيأتي. [كتاب الإجارة، 6/5، ط. أيج أيم سعيد كمبني]

وفي الفتاوى العالمكيرية: (وأما حكمها) فوقوع الملك في البدلين ساعة فساعة إلا بشرط تعجيل الأجرة. [كتاب الإجارة، الباب الأول في تفسير الإجارة وركنها وألفاظها وشرائطها وبرائطها وبيان أنواعها وحكمها وكيفية انعقادها وصفتها، 411/4، مكتبه رشيديه]

وفي بدائع الصنائع: وحكم التصرف في الأجرة قبل القبض إذا وحبت في الذمة حكم التصرف في الثمن قبل القبض إذا كان دينا. وقد بينا ذلك في كتاب البيوع. وإذا لم يجب بأن لم يشترط فيها التعجيل فحكم التصرف فيها نذكره في بيان حكم الإجارة إن شاء الله عز وجل. وما كان منها عينا مشارا إليها فحكمه حكم الثمن إذا كان عينا، حتى لو كان منقولا لا يجوز التصرف فيه قبل القبض، وإن كان عقارا فعلى الاختلاف المعروف في كتاب البيوع أنه يجوز عند أبي حنيفة وأبي يوسف، وعند محمد لا يجوز، وهي من مسائل البيوع. [كتاب الإجارة، 193/4، ط. مكتبه رشيديه]

وفي الدر المختار: (وحاز) (التصرف في الثمن) بحبة أو بيع أو غيرهما لو عينا، أي: مشارا إليه، ولو دينا فالتصرف فيه تمليك ممن عليه الدين، ولو بعوض، ولا يجوز من غيره. ابن مالك. (قبل قبضه) سواء (تعين بالتعيين) كمكيل (أو لا) كنقود. فلو باع إبلا بدراهم أو بكر بر جاز أخذ بدلهما شيئا آخر (وكذا الحكم في كل دين قبل قبضه كمهر وأجرة وضمان متلف) وبدل خلع وعتق بمال وموروث وموصى به. والحاصل جواز التصرف في الأثمان والديون كلها قبل قبضها. "عيني". [كتاب البيوع، فصل في التصرف في المبيع والثمن قبل القبض والزيادة والحط فيهما وتأجيل الديون، 152/5، ط. أيج أيم سعيد كمبني]

وفي رد المحتار: قوله: (وجاز التصرف في الثمن إلخ) الثمن: ما يثبت في الذمة دينا عند المقابلة، وهو النقدان والمثليات إذا كانت معينة وقوبلت بالأعيان أو غير معينة وصحبها حرف الباء. وأما المبيع: فهو القيميات والمثليات إذا قوبلت بنقد أو بعين وهي غير معينة، مثل اشتريت كر بر بحذا العبد. هذا حاصل ما في "الشرنبلالية" عن "الفتح"، وسيذكره المصنف في آخر الصرف. قوله: (أو غيرهما) كإجارة ووصية. "منح". ... وإنما مراد الشارح بيان أن الثمن قسمان؛ لأنه تارة يكون حاضرا، كما لو اشترى عبدا بمذا الكر من البر أو بحذه الدراهم، فهذا يجوز التصرف قبل قبضه بحبة وغيرها من المشتري وغيره، وتارة يكون دينا في الذمة كما لو اشترى العبد بكر بر أو عشرة دراهم في الذمة ، فهذا يجوز التصرف فيه بتمليكه من المشتري فقط؛ لأنه تمليك الدين، ولايصح إلا ممن هو عليه. ... قوله: (فالتصرف فيه تمليك ممن عليه الدين) في بعض النسخ : تمليكه ، وهي الموافقة لقول ابن ملك: فالتصرف فيه هو تمليكه إلخ أي: أن التصرف فيه الجائز هو كذا. قوله: (ولو بعوض) كأن اشترى البائع من المشتري شيئا بالثمن الذي له عليه أو استأجر به عبدا أو دارا للمشتري. ومثال التمليك بغير عوض هبته ووصيته له. "غراد وهب منه الثمن ملكه بمجرد الهبة لعدم احتياجه إلى القبض. وكذا الصدقة. "ط" عن "أبي السعود". قوله: (ولايجوز من غيره) أي: لايجوز تمليك الدين من غير من عليه الدين، إلا إذا سلطه عليه. واستثني في الأشباه من ذلك ثلاث صور. الأولى: إذا سلطه على قبضه، فيكون وكيلا قابضا للمولى ثم لنفسه. الثانية: الحوالة. الثالثة: الوصية. قوله: (كمكيل) فإنه إذا أشترى العبد بحذا الكر من البر تعين ذلك الكر، فلايجوز له دفع كر غيره.

مطلب فيما تتعين فيه النقود وما لاتتعين. قوله: (كنقود) فإذا اشترى بهذا الدرهم له دفع درهم غيره. وعدم تعين النقد ليس على إطلاقه، بل ذلك في المعاوضات، وفي العقد الفاسد على إحدى الروايتين، وفي المهر، ولو بعد الطلاق قبل الدحول، وفي النذر والأمانات والهبة والصدقة والشركة والمضاربة والغصب والوكالة قبل التسليم أو بعده. ويتعين في الصرف بعد هلاكه وبعد هلاك المبيع، وفي الدين المشترك فيؤمر برد نصف ما قبض على شريكه، وفيما إذا تبين بطلان القضاء بأن أقر بعد الأحذ أنه لم يكن له على خصمه شيء فيرد عين ما قبض لو قائما. وتمامه في الأشباه في أحكام النقد. وقدمناه في أواخر البيع الفاسد. قوله: (فلو باع إلخ) تفريع على قول المصنف: وجاز التصرف في الشمن إلخ. ... قوله: (وكذا الحكم في كل دين) أي: يجوز التصرف فيه قبل قبضه، لكن بشرط أن يكون تمليكا ممن عليه بعوض أو بدونه كما علمت.]كتاب البيوع، فصل في التصرف في المبيع والثمن قبل القبض والزيادة والخط فيهما وتأجيل الديون، مطلب في بيان الثمن والمبيع والدين، \$152/2، ط. أيج أيم سعيد كمبني]

وفي فتح القدير: وكمال الملك بكونه مطلقا للتصرف وحقيقته مع كونه حاجزا. [كتاب الزكاة، 113/2، ط. مكتبه رشيدية]

وفي الكفاية شرح الهداية: ومن جملته البيع قبل القبض، فإنه ملك للمشتري وليس بتمام، لأن الملك عبارة عن المطلق الحاجز، أي: يطلق تصرف المالك كيف شاء ويمنع غيره عن التصرف فيه. وما لم يكن بحذا التفسير كان ناقصا. والمبيع ليس بحذه الصفة لأنه لايجوز التصرف فيه قبل القبض. [(كتاب الزكاة، 112/2، ط. مكتبه رشيدية] Employee's¹¹ National Insurance contributions are deducted at source at a defined rate and, according to how much contribution an individual is credited with throughout his working life, forms the basis of the basic state pension. The amount deducted may be construed in either of the following two ways:

- Employee's National Insurance contributions constitute deferred salary which the state agrees to disburse to the employee upon retirement in the form of the state pension. However, if the state pension is considered to be a consequence of a contract between the employee and the state, any excess received by the employee beyond his contributions would constitute *ribā*.
- Employee's National Insurance contributions do not constitute deferred salary as there is, at least implicitly, an agreement between the employee and the state that such deductions will be made according to an agreed schedule. No employee is allowed to refuse to make such contributions. Ownership of the deducted monies is vested in the state upon receipt by HMRC on the basis of this agreement, and in any case by appropriation (isti 'la ') of the same.

It would appear that the second possibility is more preferable on account of the fact that such deductions are mandatory and the inevitable norm. Any individual taking up employment does so with the understanding that such deductions will be made, and a refusal to do so is in breach of law. Furthermore, such deductions cannot be reclaimed in the event of death prior to retirement. Accordingly, the state pension must be considered to be a unilateral undertaking by the state to provide a defined benefit to its citizens upon retirement according to a pre-agreed schedule. This also obviates any incidence of $rib\bar{a}$.

3. Employee's pension contributions

i.e., the sum regularly deducted subsequent to entry into an occupational pension scheme as a contribution towards the scheme before actual receipt of the regular wage. The deducted sum constitutes deferred salary, and hitherto only incomplete propriotorship with appropriate rulings is established. Such sum remains a debt upon the employer in favour of the employee.

4. Employer's pension contributions

i.e., the sum that the employer undertakes to contribute when the employee enters in to the occupational pension scheme. The critical issues here relate to, firstly, the status of the employer's contribution and, secondly, to its ownership. With regards to the first of these two, as the employer has made a contractual undertaking to contribute to the scheme, it cannot be argued that this is purely a unilateral act of good will (tabarru') or even a unilateral promise (wa'd). Rather, as a contractual obligation, the employer's contribution effectively forms a deferred element of the total amount of remuneration for services rendered. However, as in the case of the employee's contributions, rendering of service, in itself, only establishes incomplete proprietorship with limited powers to contract therewith. Such sum remains a debt upon the employer in favour of the employee.

5. Income Tax

Income tax is also a mandatory deduction and the inevitable norm. Again, any individual taking up employment does so with the understanding that their earnings will be subject to income tax at predetermined rates, and a refusal to pay the relavent income tax is in breach of law. Again, ownership of the deducted monies is vested in the state upon receipt by HMRC on the basis of this understanding, and in any case by appropriation ($isti l\bar{a}$) of the same.

Agency (wakāla) in pensions

If an employer maintains the right of disposal over both the employee and the employer pension contributions and determines unilaterally as to how they are to be invested, if at all, the employer retains ownership of the said contributions and the value thereof remains a debt upon the employer in favour of the employee. The employee enjoys only defective proprietorship of non-specific sums of equivalent value. i.e., whilst the employee enjoys proprietorship over the remuneration owed to him, such proprietorship cannot be assigned to specific units of

¹¹ Employer's NI Contributions are not relevant to this discussion as they do not have an association with an employee's basic state pension.

money. Thus, when the employer exercises his right of disposal, he does so in his own property. However, if the employee is empowered to choose how such contributions are to be invested, or the contributions are invested by mutual agreement on behalf of the employee, then upon receipt by a third party [such as a pension provider or an investment company] complete ownership will be vested in the employee by proxy; the third party, being the agent ($wak\bar{\imath}l$) of the employee, will effect possession of the contributions and all proprietary rights and obligations will accrue to the employee.

Types of pension

Occupational pensions/company pensions

There are essentially two types of occupational schemes:

- defined benefit (final salary, career average) based on the salary and how long the employee has worked for the employer
- defined contribution (money purchase) based on how much has been paid into the pension and how well it has performed

A **final salary** pension is one in which the pension is a proportion of the employee's salary at or near retirement date and is linked to the number of years the employee have worked for the particular employer.

Members contribute to the scheme with the promise of a certain level of pension. The amount of pension payable from such a scheme is dependent upon:

- the length of time served in the scheme (known as pensionable service);
- earnings prior to retirement (known as final pensionable salary); and
- the scheme's 'accrual rate'. The accrual rate is the proportion of salary that is received for each year of service. So, if the scheme has an accrual rate of 60, the member will receive 1/60ths of the final pensionable salary for each year of service completed.

For example: pensionable service x pensionable salary

60

A common multiple for a final salary pension is 1/60 for each year of service. If the employee works for the employer for 40 years, the employee will accrue 40/60 x the final salary as a pension. This would then equate to two thirds of the final salary as a pension.

The main benefit of a final salary pension is the fact that the employer provides a guarantee that the pension will be a certain amount, and that the pension will increase at least in line with minimum standards. The employee may be required to contribute, but will invariably get a good deal with a final salary pension.

Example:

Aḥmed joins the NHS at age 25 and becomes a member of pension scheme from day one. The NHS deducts 6% from his salary every month. He retires at 65. He receives 40/60 multiplied by final salary as a pension benefit + 3 times final salary as a tax free lump sum. The pension is payable until his death, after which his wife recived 50% of what he recived. Upon his wife's death all payments cease. If Aḥmad passes away prior to retirement, pension benefits are transferred to his wife.

Ruling on final salary schemes – the final salary scheme forms part of the employment ($ij\bar{a}ra$) contract in which the remuneration for services rendered must be known property of value. The pension payments constitute a deferred, and hitherto uncertain, portion of the employee's remuneration (ajr). The employee agrees to receive a known sum (salary) now as part of the full remuneration and a contingent and final uncertain sum (pension) at a later date. Payment of the pension is contingent upon reaching retirement age and the eventual final sum is a function of the death of the employee and the employee's spouse, if any. The counter values of commutative

contracts, including the remuneration in employment contracts, must be both certain and clearly determined and so, according to strict analogy, final salary pensions are defective contracts due to the inherent uncertainty involved. The normative effect of a defective employment contract is that it necessitates aggregate fair remuneration (*ajr al-mithl*) as opposed to that which has been agreed unless the agreed remuneration is the lesser of the two. Consequently, further to the rendering of services, the employee is entitled to the lesser of the two and, being recompense for permissible services rendered, such remuneration will be ritually pure for the employee, but the employee will incur the sin of contracting a defective contract.

However, juristic preference (istihsan) requires that, due to prevalent practice and the absence of dispute amongst the parties, this inherent uncertainty of final salary schemes is tolerated, 12 the contract is not defective and the employee does not incur sin. The same ruling applies to career average schemes.

A **defined contribution** pension is one in which the pension is based on the total value on retirement of the money paid into the scheme and on how the investment has performed.

Defined contribution schemes are sometimes referred to as money purchase schemes. Employers and employees contribute to the scheme, where the money is invested, and build up, for each scheme member, a 'pot of money'. The amount of pension payable from this scheme is dependent upon:

- the amount of money paid into the scheme (by the member and the employer);
- how well the investment funds perform; and
- the 'annuity rate' at the date of retirement. An annuity rate¹³ is the factor used to convert the 'pot of money' into a pension.

Example:

Aḥmed joins Al-Qalam at age 25 and retires at 65. He again contributes 6% of salary and his employer matches this. On retirement his pension pot is worth £250,000, having been invested for the last 40 years in a *sharī'a* compliant manner. Aḥmed elects to take 25% of his fund as a tax free lump sum. With regards the other 75%, he has a choice of either an annuity or income drawdown (ID). He elects for ID, which means he continues to invest the money in a manner of his choice, and commits to a tri annual review of investment and fixes for three years the amount of income he takes. If Aḥmad passes away prior to retirement the value of the fund is given as a tax free lump sum to his beneficiaries.

<u>Ruling on money purchase schemes</u> - the money purchase scheme also forms part of the employment (*ijāra*) contract but does not suffer the inherent uncertainty of final salary schemes. Here too, the employee agrees to receive a known sum (salary) now as part of the full remuneration with the balance being invested. If invested in a *sharīʿa* compliant manner, it has the potential to serve the needs of UK Muslims. However, the concept of 'annuity' wherein a regular income is purchased for life in return for the pension fund is not compatible with *sharīʿa* for obvious reasons.

Personal pensions

Conventional personal pensions carry very much the same ruling as the occupational pensions mentioned above.

Suggestions to Regulators and Providers for a sharī'a compliant pension structure:

Employee will contribute a percentage towards the scheme, which will be deducted at source by the employer and forwarded to the fund manager. The employee will realise proprietorship through the possession of his agent, the fund manager.

12 ففي فقه البيوع: ويشكل عليه إن كان من الأجرة، فإنه مجهول لأنه لا يعرف كم سيحى الموظف بعد التقاعد. وأجيب بأن هذه الجهالة لا تفضي إلى النزاع ؟ لأن القانون ضبطها بضوابط، وأصبح ذلك عرفا عاما، ولا يحدث فيه نزاع. فهذه الجهالة مغتفرة، مثل أجرة دخول الحمام وما سيأتي من جواز طعام البوفيه. [المبحث الثالث، الشرط الخامس، بيع راتب التقاعد، 358/1-359، ط. مكتبة معارف القرآن]

¹³ The present value of a series of payments of unit value per period payable to an individual that is calculated based on factors such as the mortality of the annuitant and the possible investment returns.

- The employer will also contribute a percentage towards the scheme and forward the same on behalf of the employee to the fund manager. This will, by virtue of being legally enforceable condition of the employment contract, also form a part of the salary and proprietorship of the same will be realised by the employee through the possession of the fund manager.
- The contributions will be invested in various avenues according to employee return requirements, risk tolerance and any unique circumstances, etc.
- Upon retirement, contributions and returns will be redeemed. [risk of loss always exists but this pension fund has been very astute/prudent!]
 - Employee now retired can take a cash sum [say up to 25%] for immediate requirements [conservatory, cabin cruise, etc]
 - Balance:
- Arrange for it to be invested with a *sharīʿa* compliant *takāful* company
- Arrange a monthly withdrawal until a certain age [say 75-80] after which he arranges for the balance to be invested with a *sharīʿa* compliant *takāful* company
- Employee will have total freedom to redeem the total or part of his accumulated account before retirement
- Employee can port to another fund manager at given intervals while giving sufficient prior notice [say thirty days].
- In case of death before retirement, investment will be redeemed and made available to legal heirs [whom he will have designated as his beneficiaries]

كتبه العبد محمد زبير بت غفر له دار الإفتاء ، دار التربية الإسلامي 16 رمضان المبارك 1439هـ