

In the name of the Allah, The Beneficent, The Merciful

This *fatwā* seeks to clarify the sharī'ah perspective on the permissibility of pensions, both personal pensions as well as occupational pensions (final salary as well as money purchase).

Given the complexity of the area, the paper first looks at some pertinent sharī'ah issues relating to employment law, as well as the potential of *gharar* (uncertain) clauses to void a contract as well as the central issue of ownership of pension without possession.

The *fatwā* will then address the pension issue having first dealt with the prerequisite issues. The *fatwā* concludes that income received from UK pensions can be deemed to be pure (*tayyib*) income (assuming the underlying investments are sharī'ah compliant). However, the pension contract is defective - *fâsid* from a sharī'ah perspective. The *fatwā* also addresses the permissibility of annuities and other alternatives.

The *fatwā* 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 - *sahih* from a sharī'ah perspective.

A contract of employment is a type of *ijârah* [*ijârah al'amal* – lease of labour]. The primary cornerstone *rukn* of *ijârah* is verbal offer and acceptance indicating the same.

ففي بدائع الصنائع: أما ركنها فالإيجاب والقبول وذلك بلفظ دال عليها. (كتاب الإجارة، 4:174)

An *ijârah* contract maybe either valid - *sahih*, void - *bâtil*, or defective – *fâsid*. A valid *ijârah* contract is that which is legal in both its fundamental and ancillary components. A defective *ijârah* contract is that which is fundamentally legally sound but that has a forbidden characteristic, such as the absence of sufficient clarity, or an incongruous condition. A void *ijârah* 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.

ففي الدر المختار: (الفاقد) من العقود (ما كان مشروعاً بأصله دون وصفه، والباطل ما ليس مشروعاً أصلاً) لا بأصله ولا بوصفه. (كتاب الإجارة، باب الإجارة الفاسدة، 6:45)  
وفي رد المحتار: قوله: (دون وصفه) وهو ما عرض عليه من الجهالة أو اشتراط شرط لا يقتضيه العقد حتى لو خلا عنه كان صحيحاً. ط. قوله: (والباطل) كأن استأجر بميتة أو دم أو استأجر طبيباً ليشمه أو شاة لتتبعها غنمه أو فحلاً لينزو أو رجلاً لينحت له صنماً. ط. قوله: (ولا بوصفه) لأنه حيث بطل الأصل تبعه الوصف قوله: (وجوب أجر المثل) أي أجر شخص مماثل له في ذلك العمل. (كتاب الإجارة، باب الإجارة الفاسدة، 6:45)

The effect of a defective *ijârah* contract is that it necessitates fair monetary remuneration – *ujrah al-mithl*, i.e., the aggregate market rate, as opposed to the agreed remuneration – *ujrah al-musammâ* unless the agreed remuneration is the lesser of the two. Such remuneration is also *tayyib* - ritually pure for the employee. A void *ijârah* contract does not earn any remuneration.

ففي الدر المختار: (وحكم الاول) وهو الفاسد (وجوب أجر المثل بالاستعمال) لو المسمى معلوماً. ابن كمال (بخلاف الثاني) وهو الباطل فإنه لا أجر فيه. (كتاب الإجارة، باب الإجارة الفاسدة، 6:45)  
وفيه: (لم يزد) أجر المثل (على المسمى) لرضاهما به (وينقص عنه) لفساد التسمية. (كتاب الإجارة، باب الإجارة الفاسدة، 6:49)  
وفي رد المحتار: قوله: (وجوب أجر المثل) أي أجر شخص مماثل له في ذلك العمل. والاعتبار فيه لزمان الاستئجار ومكانه من جنس الدراهم والدنانير لا من جنس المسمى لو كان غيرهما. ولو اختلف أجر المثل بين الناس فالوسط، والأجر يطيب وإن كان السبب حراماً كما في المنية. فهستاني. ونقل في المنح أن شمس الأئمة 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، 6:45)

One of the conditions for a valid *ijârah* contract is that the remuneration for the labour must be known property of value. The basis of this condition is the Hadīth: "Whoever hires a labourer should inform him of his remuneration." [Al-Musannaf Ibn Abi Sheybah]. 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 – *uqūd mu'āwadhah* 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.

ففي بدائع الصنائع: وأما الذي يرجع إلى ما يقابل المعقود عليه، وهو الأجرة. والأجرة في الإجازات معتبرة بالثمن في البياعات؛ لأن كل واحد من العقدين معاوضة المال بالمال، فما يصلح ثمنا في البياعات يصلح أجرة في الإجازات 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 اسْتَأْجَرَ أَجِيرًا فَلْيُعَلِّمُهُ أَجْرَهُ }، والعلم بالأجرة لا يحصل إلا بالإشارة والتعيين أو بالبيان. ... وإن كان بغير عينه، فإن كان مما يثبت دينا في الذمة في المعاوضات المطلقة كالدرهم والدينار والمكيلات والموزونات والمعدودات المتقاربة والثياب لا يصير معلوما إلا ببيان الجنس، والنوع من ذلك الجنس، والصفة والقدر، إلا أن في الدرهم والدينار إذا لم يكن في البلد إلا نقد واحد لا يحتاج فيها إلى ذكر النوع والوزن ويكتفى بذكر الجنس ويقع على نقد البلد ووزن البلد. وإن كان في البلد نقود مختلفة يقع على النقد الغالب. وإن كان فيه نقود غالبية لا بد من البيان. إن لم يبين فسد العقد. (كتاب الإجارة، فصل وأما شرط الركن فانواع، 193:4)

### Minor and gross uncertainty

Most commutative contracts involve some element of uncertainty; however, uncertainty *per se* is not prohibited. Rather, it is only excessive 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 allowable. This precept can be demonstrated by a few examples in classical Islamic 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, Imâm Abu Hanîfah *rahimahullâh* has allowed it on the basis of *istihsân* - juristic preference, as firstly, it is the prevalent practice, and secondly, the uncertainty here does not give rise to dispute between the two parties.

ففي الميسوط 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 العمل مجهول؛ لأنه لا يدري ما تلد منها وكم تلد، وجهالة المعقود عليه مفسدة للعقد، ولكنه استحسن ذلك فأجازته؛ لأنه عمل الناس ولأن هذه الجهالة لا تقضى إلى المنازعة بينهما، والجهالة بعينها لا تفسد العقد. فكل جهالة لا تقضى إلى المنازعة فهي لا تؤثر في العقد. (كتاب الإجازات، باب إجارة الراعي، 185:15)

2. If one employs the services of a labourer in consideration of a fixed sum + food, or one hires a mount for a fixed sum + its feed, the contract is defective 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 the services of a cook and bake in consideration of food and clothing, the contract is defective as the total remuneration is uncertain. By analogy, hiring the services of a wet-nurse in consideration for her food and clothing is also defective according to Imâm Abû Yûsuf and Imâm Muhammad, as the remuneration of food and clothing entails uncertainty. However, Imâm Abû Hanîfah 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:

... وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ ... [البقرة: 233]

... but the father of the child will bear the cost of the mother's food and clothing on a reasonable basis. ...

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:

وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ [البقرة: 233]

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

And further:

وَإِنْ أَرَدْتُمْ أَنْ نَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا اتَّيْتُمْ بِالْمَعْرُوفِ [البقرة: 233]

*And if you decide on 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, Allâh ﷻ 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.

**ففي 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 الظئر بطعامها وكسوتها أنه لا يجوز. وهو قول أبي يوسف ومحمد لجهالة الأجرة، وهي الطعام والكسوة، إلا أن أبا حنيفة استحسنت الجواز بالنص وهو قوله عز وجل: ﴿وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ﴾ من غير فصل بين ما إذا كانت الوالدة منكوحة أو مطلقة، وقوله عز وجل: ﴿وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ﴾ [البقرة: 233] أى الرزق والكسوة، وذلك يكون بعد موت المولود له، وقوله تعالى: ﴿وَإِنْ أَرَدْتُمْ أَنْ نَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا اتَّيْتُمْ بِالْمَعْرُوفِ﴾ نفي الله سبحانه وتعالى الجناح عن الاسترضاع مطلقا. وقولهما: الأجرة مجهولة مسلم لكن الجهالة لاتمنع صحة العقد لعينها، بل لإفضائها إلى المنازعة، و جهالة الأجرة في هذا الباب لاتقتضى إلى المنازعة؛ لأن العادة جرت بالمسامحة مع الأظار والتوسيع عليهن شفقة على الأولاد، فأشبهت جهالة الفقيز من الصبرة. (كتاب الإجارة، باب الإجارة الفاسدة، 22:6)

**وفي الدر المختار:** (و) كذا (بطعامها وكسوتها) ولها الوسط، وهذا عند الإمام لجريان العادة بالتوسعة على الظئر شفقة على الولد. (كتاب الإجارة، باب الإجارة الفاسدة، 73:9)

**وفي رد المحتار:** (قوله لجريان العادة الخ) جواب عن قولهما لاتجوز؛ لأن الأجرة مجهولة. ووجهه أن العادة لما جرت بالتوسعة على الظئر شفقة على الولد لم تكن الجهالة مفضية إلى النزاع، والجهالة ليست بمانعة لذاتها، بل كونها مفضية إلى النزاع. (كتاب الإجارة، باب الإجارة الفاسدة، 73:9)

**وفي تبيين الحقائق:** قال رحمه الله: (وبطعامها وكسوته) هذا عند أبي حنيفة رحمه الله. وقالوا: لا يجوز، وهو قول الشافعي، وهو القياس؛ لأن الأجرة مجهولة، فصار كما إذا استأجرها بهما للطبخ والخبز. وله أن الجهالة هنا لاتقتضى إلى المنازعة؛ لأن العادة جرت بالتوسعة على الأظار شفقة على الأولاد ولايشاحها بل يعطيها ما طلبت ويوافقها على مرادها. والجهالة إذا لم تفض إلى المنازعة لاتمنع الصحة، كبيع فقيز من صبرة طعام، بخلاف الطبخ والخبز وغير ذلك؛ لأن الجهالة فيها تقتضى إلى المنازعة لجريان المماكسة والمضايقة فيها. وفي المحيط: لو شرطت طعامها وكسوتها عند سنة أشهر وشرطت دراهم مسامة عند الفطام ولم تضاف شيئا من ذلك جاز استحسانا من غير بيان عند أبي حنيفة رحمه الله، والمعنى ما بيناه. (كتاب الإجارة، باب الإجارة الفاسدة، 123:6)

## 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
5. Income Tax

### 1. Wages received

The nett wages received by the employee from his employer as remuneration for services rendered are known. Complete<sup>1</sup> proprietorship of the same is realised by the employee upon receipt.

<sup>1</sup> Ownership of salary is established even before possession is achieved [unless the remuneration is paid in advance of the rendering of services]. 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 contract of *hawalah* - assignment of debt. 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 الإحارة... أما الأول: فهو ثبوت الملك في المنفعة للمستأجر، وثبوت الملك في الأجرة المسماة للأجر؛ لأنها عقد معاوضة إذ هي بيع المنفعة، والبيع عقد معاوضة، فيقتضى ثبوت الملك في العوضين. وأما وقت ثبوته فالعقد لا يخلو إما أن كان عقد مطلقاً عن شرط تعجيل الأجرة، وإما أن شرط فيه تعجيل الأجرة أو تأجيلها. فإن عقد مطلقاً فالحكم يثبت في العوضين في وقت واحد، فيثبت الملك للمواجر في الأجرة وقت ثبوت الملك للمستأجر في المنفعة، وهذا قول أصحابنا... وأما كيفية ثبوت حكم العقد فعندنا يثبت شيئاً فشيئاً على حسب حدوث محله، وهو المنفعة؛ لأنها تحدث شيئاً فشيئاً. (كتاب الإحارة، 4:201)

**وفي الدر المختار:** وحكمها: وقوع الملك في البديلين ساعة فساعة. (كتاب الإحارة، 6:5)

**وفي رد المختار:** (قوله ساعة فساعة) لأن المنفعة عرض لا تبقى زمانين. فإذا كان حدوده كذلك فيملك بدله كذلك فصداً للتعاقد، لكن ليس له المطالبة إلا بمضى منفعة مقصودة كالبيع في الدار والأرض والمرحلة في الدابة كما سيأتي. (كتاب الإحارة، 6:5)

**وفي الفتاوى العالمكبرية:** (وأما حكمها) فوقع الملك في البديلين ساعة فساعة إلا بشرط تعجيل الأجرة. (كتاب الإحارة، الباب الأول في تفسير الإحارة وركبتها وألفاظها وشرائطها وبيان أنواعها وحكمها وكيفية انعقادها وصفتها، 4:411)

**وفي بدائع الصنائع:** وحكم التصرف في الأجرة قبل القبض إذا وجبت في الذمة حكم التصرف في الثمن قبل القبض إذا كان ديناً. وقد بينا ذلك في كتاب البيوع. وإذا لم يجب بأن لم يشترط فيها التعجيل فحكم التصرف فيها نذكره في بيان حكم الإحارة إن شاء الله عز وجل. وما كان منها عينا مشاراً إليها فحكمه حكم الثمن إذا كان عينا، حتى لو كان منقولاً لا يجوز التصرف فيه قبل القبض، وإن كان عقاراً فعلى الاختلاف المعروف في كتاب البيوع أنه يجوز عند أبي حنيفة وأبي يوسف، وعند محمد لا يجوز، وهي من مسائل البيوع. (كتاب الإحارة، 4:193)

**وفي الدر المختار:** (وجاز) (التصرف في الثمن) بمبة أو بيع أو غيرهما لو عينا، أى مشاراً إليه، ولو ديناً فالتصرف فيه تمليكاً من عليه الدين، ولو بعوض، ولا يجوز من غيره. ابن مالك. (قبل قبضه) سواء (تعين بالتعيين) كمكيل (أو لا) كتنقود. فلو باع إبلاً بدراهم أو بكر بر جاز أخذ بدلها شيئاً آخر (وكذا الحكم في كل دين قبل قبضه كهمر وأجرة وضمان متلف) وبدل خلع وعتق بمال وموروث وموصى به. والحاصل جواز التصرف في الأمان والديون كلها قبل قبضها. عيني. (كتاب البيوع، فصل في التصرف في المبيع والثمن قبل القبض والزيادة والحط فيهما وتأجيل الدين، 5:152)

**وفي رد المختار:** قوله: (وجاز التصرف في الثمن إلخ) الثمن: ما يثبت في الذمة ديناً عند المقابلة، وهو التقدان والمثلثات إذا كانت معينة وقوبلت بالأعيان أو غير معينة وصحبها حرف الباء. وأما المبيع: فهو القيميات والمثلثات إذا قوبلت بنقد أو بعين وهي غير معينة، مثل اشتريت كر بر بهذا العبد. هذا حاصل ما في الشرنبلالية عن الفتح، وسيذكره المصنف في آخر الصرف. قوله: (أو غيرهما) كإحارة ووصية. منح... وإنما مراد الشارح بيان أن الثمن قسمان؛ لأنه تارة يكون حاضرًا، كما لو اشترى عبداً بهذا الكر من البر أو بهذه الدراهم، فهذا يجوز التصرف قبل قبضه بمبة وغيرها من المشتري وغيره، وتارة يكون ديناً في الذمة كما لو اشترى العبد بكر بر أو عشرة دراهم في الذمة، فهذا يجوز التصرف فيه بتملكه من المشتري فقط؛ لأنه تملك الدين، ولا يصح إلا لمن هو عليه. ... قوله: (فالتصرف فيه تمليكاً من عليه الدين) في بعض النسخ: تمليك، وهي الموافقة لقول ابن ملك: فالتصرف فيه هو تمليكك إلخ أى أن التصرف فيه الجائز هو كذا. قوله: (ولو بعوض) كأن اشترى البائع من المشتري شيئاً بالثمن الذي له عليه أو استأجر به عبداً أو داراً للمشتري. ومثال التمليك غير عوض هبته ووصيته له. فخر. فإذا وهب منه الثمن ملكه بمجرد الهبة لعدم احتياجه إلى القبض. وكذا الصدقة. ط عن أبي السعود. قوله: (ولا يجوز من غيره) أى لا يجوز تمليك الدين من غير من عليه الدين، إلا إذا سلطه عليه. واستثنى في الأشباه من ذلك ثلاث صور. الأولى: إذا سلطه على قبضه، فيكون وكيلاً قابضاً للمولى ثم لنفسه. الثانية: الحوالة. الثالثة: الوصية. قوله: (كمكيل) فإنه إذا اشترى العبد بهذا الكر من البر تعين ذلك الكر، فلا يجوز له دفع كره غيره.

**مطلب** فيما تعين فيه النقود وما لاتعين. قوله: (كتنقود) 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 الدخول، وفي النذر والأمانات والهبة والصدقة والشركة والمضاربة والغصب والوكالة قبل التسليم أو بعده. ويتعين في الصرف بعد هلاكه وبعد هلاك المبيع، وفي الدين المشترك فيوم بر نصف ما قبض على شريكه، وفيما إذا تبين بطلان القضاء بأن أقر بعد الأخذ أنه لم يكن له على خصمه شيء فيرد عين ما قبض لو قائماً. وتماه في الأشباه في أحكام النقد. وقدمناه في أواخر البيع الفاسد. قوله: (فلو باع إلخ) تفرع على قول المصنف: وجاز التصرف في الثمن إلخ... قوله: (وكذا الحكم في كل دين) أى يجوز التصرف فيه قبل قبضه، لكن بشرط أن يكون تمليكاً ممن عليه بعوض أو بدونه كما علمت. (كتاب البيوع، فصل في التصرف في المبيع والثمن قبل القبض والزيادة والحط فيهما وتأجيل الدين، مطلب في بيان الثمن والمبيع والدين، 5:152)

**وفي فتح القدير:** وكما الملك بكونه مطلقاً للتصرف وحقيقته مع كونه حاجزاً. (كتاب الزكاة، 2:113)

**وفي الكفاية شرح الهداية:** ومن جهته البيع قبل القبض، فإنه ملك للمشتري وليس بتمام، لأن الملك عبارة عن المطلق الحاجز: أى يطلق تصرف المالك كيف شاء ويمنع غيره عن التصرف فيه. وما لم يكن بهذا التفسير كان ناقصاً. والمبيع ليس بهذه الصفة لأنه لا يجوز التصرف فيه قبل القبض. (كتاب الزكاة، 2:112)

## 2. Employee's National Insurance contributions

Employee's<sup>2</sup> 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 *ribâ*.
- 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 HM Revenue and Customs on the basis of this agreement, and in any case by *istilâ'* - appropriation 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 the 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 *ribâ*.

## 3. Employee's pension contributions

i.e., the sum regularly deducted subsequent to entry into the scheme as a contribution towards the pension scheme before actual receipt of the regular wage. The deducted sum constitutes deferred salary, and hitherto only incomplete proprietorship 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 on the basis of *tabarru'* – a unilateral act of good will or even *al-wa'd* – a unilateral promise. 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 pre-

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<sup>2</sup> Employer's NI Contributions are not relevant to this discussion as they do not have an association with an employee's basic state pension.

determined rates, and a refusal to pay the relevant income tax is in breach of the Law. Again, ownership of the deducted monies is vested in the State upon receipt by HM Revenue and Customs on the basis of this understanding, and in any case by *istîlâ'* - appropriation of the same.

### The issue of *wakâlah* - agency

If an employer maintains the right of disposal over both the employee and employer pension contributions and determines unilaterally as to how they are to be invested, if at all, the employer retains ownership of the contributions and the value thereof remains a debt upon him in favour of the employee. The employee enjoys only proprietorship per se of non-specific sums of equivalent value. i.e., whilst the employee enjoys proprietorship per se over the remuneration owed to him, such proprietorship cannot be assigned to specific units of 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 an investment company] complete ownership will be vested in the employee on the basis of *wakâlah* – agency. The third party, being the *wakîl* – agent 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: final salary and money purchase.

**Final salary**, in which the pension is a proportion of an employee's salary at or near retirement date and is linked to the number of years he has 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 his final pensionable salary for each year of service completed.

For example:  $\frac{\text{pensionable service} \times \text{pensionable salary}}{60}$

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

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

Example:

Ahmed 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 received 50% of what he received. Upon his wife's death all payments cease. If Ahmad passes away prior to retirement pension benefits are transferred to his wife.

Final salary – the final salary scheme is a constituent of a commutative contract – '*aqd mu'âwadhah* and the pension payments effected thereby constitute a deferred portion of the *ujrah* – remuneration. Consequently, this effects gross uncertainty with respect to the total remuneration as the amount of return by way of pension payments is determined only by how long the policy holder lives after retirement. Thus,

the entire employment contract is a defective contract and must necessarily be vitiated. As discussed above, the effect of a defective *ijārah* contract is that it necessitates aggregate fair remuneration – *ujrah al-mithl* as opposed to the agreed remuneration 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.

It may be asserted that the final salary pension scheme is a separate contract from the contract of employment and thus does not effect gross uncertainty in the latter. Such uncertainty is only a feature of the final salary pension scheme and it is only that which falls foul of *Shari'ah* principles. However, upon reflection, this does not hold true as the final salary scheme is a feature, whether mandatory or optional, of the employment contract itself and thus effectively a condition of the latter. Even if it is accorded recognition as a separate contract, as a condition of the employment contract, it equates to a contract within a contract, which is prohibited in itself.

If an employee enters into the final salary pension scheme subsequent to entering into an employment contract free of such scheme, can it be asserted that while the subsequent final salary scheme is unlawful, it is independent of the employment contract and so does not render the employment contract defective?

Firstly, if the final salary pension scheme is considered an independent contract, it will effectively amount to the sale of a debt for an undetermined debt, as the remuneration owed to the employee from which deductions are to be made is a debt and the pension payments are also deferred. Thus, the contract itself is void – *bātil* and has no legal consequence. Deductions made from the employee's salary under the scheme are considered to be held on trust by the employer and the employee's entitlement is limited to the extent deducted. Any amount received beyond that deducted is not ritually pure for the employee.

Secondly, whilst the employee has entered into the final salary pension scheme subsequently, such scheme is inextricably related to the contract of employment and forms a contractually binding condition of the amended contract. Thus, the employment contract itself is rendered defective- *fāsid* and the pension payments constitute a deferred, undetermined portion of the *ujrah* –remuneration. It then follows that whilst the initial employment contract was valid and effected entitlement to the agreed remuneration, after the introduction of the final salary pension scheme, the now defective nature of the contract necessitated aggregate fair remuneration – *ujrah al-mithl* as opposed to the agreed remuneration unless the agreed remuneration is the lesser of the two. Again, 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.

One final important consideration is that if the aggregate fair remuneration – *ujrah al-mithl* is that which is contained in a defective contract, as is arguable the case of employment contracts within the UK civil service that provide the benefit of a final salary scheme, it would be valid to conclude that whilst the contract is defective and the employee will incur the sin of contracting a defective contract, the remuneration received in the form of a salary and pension payments are ritually pure for the employee as they constitute not only the agreed remuneration but also the aggregate fair remuneration.

**Money purchase**, 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.

Money purchase schemes are sometimes referred to as defined contribution 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 rate<sup>3</sup> is the factor used to convert the 'pot of money' into a pension.

Example:

Ahmed 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 *shariah* compliant manner. Ahmed elects to take 25% of his fund as a tax free lump sum. With regards

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<sup>3</sup> 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 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. This continues until his death or until he reaches 75 when he is compelled (under new legislation brought in 2 years ago) to take an annuity. If Ahmad passes away prior to retirement the value of the fund is given as a tax free lump sum to his beneficiaries.

Money purchase - the money purchase scheme is also a constituent of a commutative contract – '*aqd mu'âwadhah*' but does not suffer the element of gross uncertainty inherent in the final salary scheme. If invested in a *Shari'ah* 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 *Shari'ah* for obvious reasons. To remain *Shari'ah* compliant, Ahmad has no choice but to opt for income draw down, which allows him to continue to keep his retirement savings invested and take an income each year rather than buy an annuity. However, this facility can only be continued to age 75, at which time an annuity has to be bought or (since 6<sup>th</sup> April 2006) the money transferred into an Alternatively Secured Pension (ASP).<sup>4</sup> Again, Ahmad is compelled to opt for the Alternatively Secured Pension (ASP) as an annuity is not compliant with the *Shari'ah*.

### Personal pensions

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

### Suggestions to Regulators and Providers for a shari'ah 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.
- 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 *Shari'ah* compliant takaful company
    - Arrange a monthly withdrawal until a certain age [say 75-80] after which he arranges for the balance to be invested with a *Shari'ah* compliant takaful 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]

**Mufti Zubair Butt**  
**Chair – Al Qalam Shariah Scholar Panel**

**26th December 2008.**

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<sup>4</sup> An ASP is a form of income drawdown. Instead of buying an annuity at age 75, an individual can continue to invest their pension savings and draw an income from their fund within laid down limits. The minimum that must be drawn as an income from the fund is 55% of an amount calculated by applying the funds available to a table produced by the Government Actuaries Department (GAD). The maximum is 90%. The GAD table is based on the level of single-life lifetime annuity rates for a person of the same sex and aged 75. No allowance is made in the annuity rate used for any level of annual pension increases. These rates were introduced with effect from 6 April 2007, following a review of ASPs by the Government. For the year 6 April 2006 to 5 April 2007, the rates were 0% (minimum) and 70% (maximum).