

## **WIVES' RIGHT TO THE GOVERNMENT RETIREMENT BENEFIT: Is it *Syariah* Compliant or Subject to *Fara'Id* Distribution?**

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*The government retirement scheme is provided primarily as a financial facility for the pensionable government officers and their dependants upon retirement. However, the question whether it is subject to the fara'i distribution after the Muslim pensioner's death is debatable. The current position is rather confusing because of the differences of opinion among Muslim scholars regarding whether or not the scheme is heritable upon death. Some jurists are of the view that the Malaysian Government's current implementation of this scheme by imposing strict rules regarding the entitlement of specific persons including the surviving wife to the benefits after the death of a pensionable officer does not meet the Syariah (This the Malay version of the word Shari'ah) principles, whereas according to others it does. This research is an attempt to analyse the related issues of the scheme in order to answer the question regarding its heritability in the case of Malaysia. The difference of opinion of Muslim scholars on this issue is examined. It has been observed that, unfortunately, most of these opinions are not based on convincing facts, and, furthermore, are not informative enough to provide Muslims an in-depth understanding of the verdicts.*

### **INTRODUCTION**

The Islamic law of succession is a divine law and it emphasizes on the entitlement of the legal heirs and their respective quantum of shares of the estate left behind by the deceased Muslim as fixed by the *Syariah* (It is the Malay version of the word *Shari'ah*). Its primary sources are the Qur'an and *Sunnah* of the Prophet (s.a.w.) (Prophetic traditions). The principles and conditions regarding the devolution of a deceased Muslim's estate are deduced from the above sources. The Qur'an and *Sunnah* prescribe in detail the entitlement and the

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quantum of shares of each legal heir. It is a religious obligation imposed on a Muslim to implement the law.<sup>1</sup> Implementing the law for property disposition is regarded as a valid means of wealth transfer after death.

It is the social responsibility of the government to protect the welfare of its citizens including its retired officers. The Government of Malaysia provides a retirement benefits scheme for pensionable officers in government service who have retired in accordance with the Malaysian pension laws. These benefits are granted only in favour of government employees who have gained permanent employment status. In order to qualify for this status, section 7 of the Malaysian Pension Act 1980 states that 'a government employee must have been confirmed in his employment and must have completed not less than 3 years of reckonable service. The current practice is that after the pensionable officers die the retirement benefits would not be subject to the *faraid* distribution but would be paid to their surviving spouses, minor and disabled children'.

The issue whether the retirement benefits are subject to the *faraid* distribution remains debatable. This is because the scheme seems to constitute the financial right of a pensionable officer; and upon his death, it is distributed among his heirs constituting his close family members based on the fixed quantum of shares as prescribed in detail by the *Syariah*. This is in fact a contemporary issue, and an answer cannot be found by simply referring to the Qur'an and *Sunnah* and the classical writings of Muslim scholars. Thus, this research will analyse in depth the nature of the retirement benefits scheme, as well as the legal contract of service between the Government and the officer. The issue of heritability can only be addressed after gaining a comprehensive understanding of what the scheme is.

### **DIFFERENCES OF OPINIONS AMONG MUSLIM SCHOLARS**

There are several opinions among Muslim scholars regarding the question as to whether or not retirement benefits, in particular the pension, are inheritable by the legal heirs upon the pensioner's death. Looking into these opinions, the main issue that creates disagreement is to do with whether the scheme is the right of a pensionable officer

or not. In other words, the determination of the heritability of the scheme depends primarily on whether it is the pensioner's right or not.

There is a *fatwa*, which was issued by the Terengganu Fatwa Council stating that a government officer's pension entitlement is not subject to *faraid* distribution. This *fatwa* is based on the notion that the scheme is similar to a reward and compensation arrangement. However, unfortunately, it is very difficult for the public to understand the *fatwa*. The *fatwa* does not discuss the issue comprehensively. It fails to cite arguments and reasoning to support the ruling. Furthermore, this *fatwa* is clearly confined merely to pensions and does not cover other kinds of benefits under such schemes.

On the other hand, Tanzil al-Rahman in his book entitled "A Code of Muslim Personal Law", contends that the pension is a right of the deceased officer, and hence it is part of his or her estate.<sup>2</sup> He argues that the pension is in fact an additional benefit of the employee that arises from the terms of service. As it is included in the terms of service, it is therefore held to be a justifiable right of the employee upon the completion of the period of service as stipulated under the service regulations. He adds that without any valid reason, an employee should not be deprived of such a right.<sup>3</sup> However, his opinion is based on his analogy to the monthly salary following his reference to the decision of the Supreme Court of Pakistan in *A. W. Issac*.<sup>4</sup> In this case, the Court held that the salary paid by the Government to a government servant was the right of the latter. Based on this, he asserts that the only difference between the right to a salary and the right to a pension is merely that the right to a salary is an existing right, whereas the right to a pension as a gratuity is a contingent, deferred and conditional right which, on arising out of the contingency or fulfilment of the condition comes into existence and becomes enforceable in law against the employer.<sup>5</sup>

It should be noted that Zulkifli<sup>6</sup> points to the opinions of Zaid Muhammad and Abdullah Abu Bakr, two Muslim scholars at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University of Malaysia. According to Zaid Mohammad, a pension paid by the

Government in favour of the pensionable officer is part of the estate of that officer after he or she dies.<sup>7</sup> In other words, after the pensionable officer dies, the pension must be paid in accordance with the *faraid* law. The argument here is that such an entitlement is deliberately allocated by the Government and hence, it is the pensionable officer who owns the original title to the pension and not the spouse or children. Abdullah Abu Bakar shares the same view and focuses on the question of ownership. He further suggests that the distribution of the pension should be made in accordance with the *faraid* law at the time it is paid.<sup>8</sup>

Tanzil al-Rahman further writes that according to Mawlana Mufti Muhammad Sabir in his book *Mishkat al-Siraj*, the pension is not the right of a pensioner but a reward and therefore it is not the estate of the deceased.<sup>9</sup> In contrast, Muda in his thesis disagrees with the opinions of Zaid Mohamad and Abdullah Abu Bakr. To him, the pension is not an estate of the deceased on the grounds that it is a kind of reward from the Government.<sup>10</sup> His argument is that the calculation used for ascertaining the amount of the pension is made at the time it is received and not at the beginning of the retirement. Furthermore, it is a kind of financial assistance from the Government to the pensionable officer and his or her family.<sup>11</sup>

### **THE SIGNIFICANCE OF GOVERNMENT RETIREMENT BENEFITS**

The old, the poor and the disabled are a group of people that needs to be protected by a government as far as the latter's social responsibility is concerned.<sup>12</sup> It is well understood that when a person retires, they lose a significant source of earnings, which not only affects them but also the family. When an employee retires from a job that has been their only source of income, they and their family are left in a very vulnerable situation. As a government servant, an officer is offered two types of retirements, known as the compulsory retirement and the optional retirement.<sup>13</sup> It is a fact that a government officer has to retire from his job once the age of compulsory retirement is attained, which is fifty five, or whenever required to do so by law and hence, has no choice except to lose the source of income on which he or she and the family have depended on.<sup>14</sup>

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When a person retires, he can be categorized relatively as the poor as far as his financial resources is concerned as compared to his previous condition prior to his retirement.<sup>15</sup> Therefore, the introduction of government retirement benefits for its officers is therefore quite useful. It seems that this scheme allows the financial burden of retired officers to be released. It is among the objectives of the pension schemes introduced by the government to provide financial security for its retired officers and their dependants.<sup>16</sup> Besides providing this financial facility upon retirement, the benefits are also intended as a reward from the Government to retired officers in terms of recognition of their loyalty and dedication during their services.<sup>17</sup> It is also regarded as compensation from the Government to officers who are forced by law to retire or who die due to injuries or sickness in the course of performing their official duties.

The permanent Government officers and their dependants are constitutionally granted retirement benefits. Their rights to these benefits are well protected and enshrined in article 74 of the Malaysian Federal Constitution as well as in paragraph 6(d) of List 1 of the Ninth Schedule of the Federal Constitution, which among other things states that pensions and compensation for loss of office; gratuities and conditions of service are federal matters. Article 147(1) further reads:

*The law applicable to any pension, gratuity or other like allowance (in this article referred to as an "award") granted to a member of any of the public services, or to his widow, children, dependant or personal representatives, shall be that in force on the relevant day or any later law not less favourable to the person to whom the award is made.*

### **TYPES OF RETIREMENT BENEFITS**

It is important to note that the retirement benefits are mainly for the benefit not only for the retired officers but also for their dependants, which includes the spouse and dependants. These benefits are covered by the public sector pension scheme. This scheme covers such benefits for officers in the public service, employees of statutory and local authorities, Members of Parliament and the Administration, Political Secretaries, Judges and the Armed Forces. The scheme is administered

by the Pension Division of the Public Service Department, which is entrusted with the responsibility for administering retirement benefits efficiently and effectively in accordance with the regulations currently in force, to ensure that eligible pensioners enjoy the benefits of retirement promptly.<sup>18</sup>

In this regard, there are benefits allocated in favour of the officer and benefits that are specifically for dependants. The service pension and the service gratuity are solely for pensionable officers. The service pension is granted to the officer who retires in accordance with the provisions in the pensions laws whereas, the service gratuity is a lump sum payment granted upon retirement. The former is paid every month after retirement and the latter is paid once upon retirement.<sup>19</sup>

The pensionable officer is also entitled to a disability pension, an alimentary allowance and a cash award in lieu of accumulated leave. The disability pension is granted to an officer who is required to retire as a result of sustaining an injury in the course of performing an official duty or because of a travel accident or from contracting a disease to which he was exposed to by the nature of his duty. This benefit is in addition to the service pension. However, it is only granted if the injury sustained or disease contacted is not directly attributable to the officer's negligence or misconduct.<sup>20</sup> The alimentary allowance is a monthly payment and may be granted when a pensioner is adjudged a bankrupt or convicted and sentenced to a term of imprisonment or death, whereupon his pension ceases with immediate effect. The cash award in lieu of accumulated leaves is for officers in the public service and is given in exchange for leave not taken on account of exigencies of service whereby the officer is permitted to accumulate up to half of his vacation leave eligibility subject to a maximum of 15 days in any one year.<sup>21</sup>

A derivative pension, a derivative gratuity and a dependant's pension are especially allocated to the dependants of the pensionable officer. A derivative pension is granted to the widow, widower or child of a permanent and confirmed officer who dies in service or during retirement. On the other hand, a derivative gratuity is a lump sum payment granted to the widow, widower, child, or dependant parent of the deceased or the legal personal representative of the

deceased officer if the officer dies in service.<sup>22</sup> A dependant's pension is granted to the dependants (widow/widower, child or dependant parent, whichever applicable) of the officer who dies as a result of sustaining injuries in the course of performing his official duty or in a travel accident or from contracting a disease to which he is exposed to by the nature of his duty or dies within 7 years of sustaining the injury or contracting the disease. This dependant's pension is in addition to the derivative pension payable to the widow, widower or child.<sup>23</sup>

All these benefits payable to the dependants of the pensionable officer are made only after his or her death. In other words, these payments seem merely to replace the benefits that are received by the pensionable officer during retirement. After the pensionable officer dies either during service or after retirement, the dependants, including any adopted children and pensionable parents, are paid all these benefits.<sup>24</sup>

### **The Constituents of Estate from the Perspective of the Islamic Law of Succession**

The estate or in Arabic known as *tarikah* or *tirkah* literally denotes things left behind by the deceased.<sup>25</sup> It also indicates the estate or the heritage left behind by the deceased.<sup>26</sup> The term is derived from the root word *taraka*, which literally implies to leave behind by way of succession or bequest.<sup>27</sup>

However, a number of Muslim jurists have differed in their attempts to give this term a technical definition. To the Hanafis, the technical meaning of *tarikah* is the property and property rights left behind by the deceased, which are free from any attachment of another's rights.<sup>28</sup> The Malikis define *tarikah* as the divisible rights that are the legal entitlement of the rightful person after the death of the owner.<sup>29</sup> The Shafi'is' definition of *tarikah* is anything left behind by the deceased.<sup>30</sup> The Hanbalis definition is that *tarikah* is the rights left behind by the deceased.<sup>31</sup> In the light of these definitions, it appears that the differences are in fact due to the questions pertaining either to the attachment of another's rights to the estate or to whether rights and usufruct constitute the components of the estate of the deceased alongside the tangible assets.

To elaborate further these definitions, it is important to study the sources that were referred to by the Muslim jurists when constructing their respective definitions. In this regard, two different versions of the Prophetic traditions have been identified as forming the basis of these definitions. The difference of opinions among the four *Sunni* schools of thought regarding the components of the estate is a result of their reliance on two different versions of the *hadith* of the Prophet (s.a.w.).

The Hanafis' definition, which apparently confines the scope of *tarikah* to tangible assets only, is based on the version, which states that only *mal* is heritable. This *hadith* states nothing pertaining to the heritability of rights. On this basis, the jurists have placed only *mal* within the definition of *tarikah*, precluding rights and usufruct from inheritance. This version of the *hadith* reads, "one who leaves the *mal*, or the property, behind him, it is for his legal heirs".<sup>32</sup>

On the other hand, the majority opinion has relied on the *hadith*, which states: "one who leaves behind the property or the right, it is for his legal heirs".<sup>33</sup> According to this opinion, the text of the *hadith* clearly demonstrates that *mal* and *haq* are the components of *tarikah*. Relying on this *hadith*, the majority have formed their stance that the heritable estate of the deceased should include *mal* (tangible assets) and *haq* or rights and *manfaah* or usufruct (intangible assets).

It is evident from the above discussion that the two versions of the *hadith* are the cause of the different views of the four *Sunni* schools regarding the definitions of *tarikah*. As a consequence of this, they differ regarding the components of *tarikah* as to whether it consists of *mal* only or also includes *haq* and *manfaah*. To the Malikis, Syafi'is and Hanbalis, the *tarikah* components consist of tangible and intangible assets, whereas to the Hanafis only tangible assets are heritable.

Apart from this, it appears that the issue of the constituents of *tarikah* is closely related to the issue of the concept of property, or *mal*, in Islamic law, and this definitely stretches to the discussion of issues regarding the *Syariah* compliance of the wealth belonging to or acquired by the deceased. This is because, when looking into these definitions, apart from the attachment of rights to the estate, the



focus is also on the terms *māl* and *%aq*. Furthermore, wealth belonging to the deceased nowadays comprises both tangible and intangible assets, such as financial rights and intellectual property rights, and this becomes an important issue because in Islamic law, heritable *māl* might include rights and services, which are intangible in nature.

### **THE OWNERSHIP OF THE ACQUIRED PROPERTY**

Ownership is the most important factor in deciding the heritability of property. Failure to meet this condition may result in the non-heritability of the property concerned. Below is a brief discussion of the requirement of *milkiyyah*. We will look at the issue of *milkiyyah* in greater detail by concentrating on the government retirement benefits, conventional life insurance and the family *takaful* business, from the perspectives of Islamic law and the laws applicable in Malaysia.

Islamic law specifies two categories of ownership, namely absolute and non-absolute ownership. Absolute ownership is where the property exclusively and absolutely belongs to the owner and is not subject to limitations of time.<sup>34</sup> The owner has the absolute right to deal with the property and no one else has any share in it.<sup>35</sup> In this respect, the owner has exclusive power to dispose of the property as he wishes. Islamic law provides four legitimate means for acquiring absolute ownership:<sup>36</sup>

- (a) The contract of exchange such as trading and leasing contracts, and unilateral contracts such as *waciyyah*, *hibah* and *waqf*;
- (b) The replacement, or *khalafiyyah*, i.e. inheritance, the payment of *diyyah* and compensation;
- (c) The control over permissible things such as fish in the sea and birds in the sky; and
- (d) The product of things owned such as chicken's eggs, cow's milk, etc.

On the other hand, non-absolute ownership is either the ownership of the corporeal without the usufruct, or the ownership

of the usufruct without the corporeal. An example of the former is a bequest of a usufruct, such as the right to reside in a house. In contrast, examples of the latter are lease, *waqf* and hire contracts. However, it is important to note that this kind of ownership is different from the permission to use.<sup>37</sup> The latter does not confer any ownership and there is no issue of inheritance. With the former on the other hand, the issue of heritability refers to the concept of *mal* as discussed above.

Having discussed these means of acquisition, any other means of acquiring property that are not legitimate according to Islamic law, do not entitle ownership to the acquirer. With wealth acquired by way of robbery, *riba* (including bank interest), *rishwah* (corruption), *gharar*-based transactions, stealing or gambling, the question of heritability rests upon the issue of whether the wealth was legally within the ownership of the deceased or not. Relying upon this contention, it is possible to conclude that if the ownership is not legitimate it is not valid to transfer the wealth to the deceased's legal heirs, because the condition of legitimate ownership has not been met. It is therefore submitted that these kinds of wealth do not constitute *tarikah*.

### **THE PROHIBITED WEALTH**

As far as inheritance is concerned, items that are prohibited, from the perspective of Islamic law, include things such as drugs, intoxicants and pork. In other words, the prohibition here applies to the subject matter that is prohibited because of its nature or substance. However, it would seem that the issue of whether this kind of wealth is considered *tarikah* or not depends on the question of whether it constitutes *mal* or not. In other words, if these things constitute *mal* they are heritable and if otherwise they are not.

The legal principle regarding this issue is whether these items are beneficial or not. In this regard, to Muslims, the benefit must accord with Islamic law rulings. It is a fundamental principle that the *Syariah* promotes benefits and prevents hardship.<sup>38</sup> Chapter *al-Anbiya'* (21): 107 states: "We sent thee not, but as a mercy for all creatures". Regarding intoxicants and gambling, chapter *al-Baqarah* (2): 219 states: "They ask concerning wine and gambling. Say: In

them is great sin and some profit, for men, but the sin is greater than the profit". The prohibition of such things is enumerated in chapter *al-Ma'idah* (5): 90: "O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork; eschew such (abomination), that ye may prosper". Chapter *al-A'raf* (7): 157 further states: "Those who follow the Messenger, the unlettered Prophet, whom they find mentioned in their own scriptures, in the law and the Gospel, for he commands them what is just and forbids them what is evil, he allows them as lawful what is good and pure and prohibits them from what is bad and impure; he releases them from their heavy burdens and from the yokes that are upon them. So it is those who believe in him, honour him, help him, and follow the light that is sent down with him, it is they who will prosper".

In light of these Qur'anic *ayat*, Muslim jurists have developed a legal maxim: Indeed the *Syariah* promotes benefits in totality; preventing hardship and promoting benefits.<sup>39</sup> In other words, the prohibition of things by the *Syariah* implies that such things do not bring benefit Islamically to the Muslim and hence, they do not constitute *mal*. It can be argued that even though the Hanafis view is that the prohibited can also constitute *mal*, taking into account the interest of the non-Muslim, the prohibited is not heritable to the Muslim because its consideration of *mal* is entirely based on the interest of the non-Muslim. To a Muslim, such interest does not exist at all. In fact, as far as the Islamic law of succession is concerned, having benefit is unanimously agreed on by Muslim scholars as being fundamental to the subject matter being considered as constituting *mal*.<sup>40</sup> Having said this, as far as Muslims are concerned, it is submitted that if something does not constitute *mal*, it is not heritable.

### **DO THE RETIREMENT BENEFITS CONSTITUTE AN ABSOLUTE RIGHT OF A PENSIONABLE OFFICER?**

It is to be noted that the objectives of the government retirement benefits, they come into existence as a result of an initiative taken by the Government. By offering such benefits, the Government can attract officers to stay in the public sector considering the fact that

such benefits will protect them and their families in terms of financial resources after retirement. It is also a way for the Government to demonstrate its appreciation of the loyalty and dedication shown by pensionable officers during their service. In this regard, these benefits are not considered as an entitlement of the pensionable officers. They are merely acts of generosity on the part of the Government in conferring rewards or assistance to their former staff after they retire. This is supported by the statutory provision of section 3(1) of the Pensions Act 1980:

*“(1) No officer shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act.”*

Section 3(1) of the Statutory And Local Authorities Pensions Act 1980 also states to similar effect:

*“No employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefits under this Act.”*

In *Haji Wan Othman & Ors v Government of the Federation of Malaya*,<sup>41</sup> the court was asked to declare the entitlement of several government pensioners to the full money value of the full pension for the remaining period of their lives after ten years of retirement. The court decided that ‘the pension scheme is not an absolute right of a government officer and as the pensioners had been paid the gratuity in lieu of their pension they had forfeited their eligibility for the full pension’. The court, therefore, refused to make a declaration in the pensioners’ favour.

There are some circumstances that prevent pensionable officers from receiving the benefits. If it were an absolute right of the pensionable officers, there should be nothing that could bar them from receiving these benefits. However, as it is a mere creation of the Government, there are limitations that may hinder the pensionable from enjoying these benefits. Such a hindrance is stated in section 3(2) of the Pensions Act 1980 that reads:

*Where the Yang di-Pertuan Agong is satisfied that an officer has been guilty of negligence, irregularity or misconduct, the Yang di-Pertuan Agong may reduce or withhold a pension, gratuity or other benefit for which the officer would have been eligible but for the provision of this section.*<sup>42</sup>

It is, therefore, understood that because these benefits are a mere product of the Government to fairly treat its former employees, the Government is free to insert any rules and regulations pertaining to the entitlement. On the other hand, if it were an absolute right of the pensionable officers, the Government certainly would have no right to add any conditions restricting or preventing the officers from exercising their rights. Furthermore, the amounts received from these benefits are decided unilaterally by the Government and based on a mathematical calculation exclusively and solely prepared by the Government. The pensionable officer receives the benefit without contributing any money; his contribution is merely his long, loyal and dedicated service.

With regard to pension adjustments, a restriction is imposed whereby these are only granted to pensioners who are resident in Malaysia.<sup>43</sup> Again, this supports the contention that it is not an absolute right of the pensioner. This regulation rules out the entitlement to the pension adjustment of a pensioner who is not resident in Malaysia. In *Dato' Ahmad Bin Yunus v Kerajaan Malaysia*,<sup>44</sup> the plaintiff, a retired government servant, sought a declaration that he, for the purpose of Sections 1(2) and 2 of the Pensions Adjustment Act 1980, was a 'resident of Malaysia' and therefore entitled to all adjustments made and /or to be made in favour of pensioners resident in Malaysia under the Act. The defendant argued that the plaintiff had ceased to be a resident of Malaysia and hence was not entitled to the pension adjustment. The court however held that since the plaintiff had initially stayed in the United Kingdom only in order to protect the Malaysian Government's interest, he should not be in any way penalized for obtaining the permanent residence status in the United Kingdom. The court further ruled that to deprive him of his pension adjustment benefits would be unfair and unjust.

Similar restrictions can be found when one observes any of these benefits. For example, in the case of a derivative pension, which is payable to the widow, widower or children, if the widow or widower remarries, or the child attains the age of 21 years, the derivative pension ceases to be payable. The same applies to a child who is pursuing education in an institution of higher learning leading to a

first degree, the derivative pension ceases to be payable upon their completion of the course, if they cease to receive such education or if they marry. In the case of a disability pension, an officer who has already been awarded compensation under the Workmen's Compensation Act 1952 is not eligible for a disability pension.

### **DO THE RETIREMENT BENEFITS ARISE FROM THE TERMS OF THE CONTRACT OF SERVICE?**

To further analyze the nature of the retirement benefits, it is best to consider the agreement between the Government i.e. the employer, with the employee that determines the rights and benefits as well as the duties of both parties. The significant issue to be discussed here is whether the contract of service between both parties gives rise to the retirement benefits in favour of the employee. In this regard, if the contract obliges the employer to provide all these benefits, it would seem that the benefits are the rights of the employee and if not, the statutory provisions mentioned previously are supported and they are not the absolute right of the employee.

In Islamic law, the contract of service is a type of contract of hire or *ijarah*.<sup>45</sup> The four Sunni schools of law, in their respective definitions of the contract of hire unanimously agree that it is a contract exclusively based upon usufruct or *manfaah*. Article 404 of the *Mejelle* defines *ijarah* as the sale of a known benefit in return for its known equivalent. In other words, it is a type of sale contract in which the subject matter is the usufruct or *manfaah*.<sup>46</sup> Unlike the corpus of the thing that exists at the beginning of the contract, the usufruct, which becomes the subject matter of the contract of hire, comes into existence only after the completion of the contract. With regard to the contract of service, this is a contract whereby one party contracts to provide the usufruct in terms of providing a service to the other party. In other words, it is a contract of hiring a party for employment purposes.

The contract of hire does exist in Islamic law and is based on the Qur'anic verse *al-Talaq* (65): 6. This verse expresses the necessity of a father to give wages to the mother who offers to breast-feed his child. A similar idea is found in verses *al-Qasas* (28): 26 and 27

regarding the appointment of a person as a shepherd where in return, the promise of the daughter's hand in marriage was made in favour of the shepherd. There are also several *hadiths* that explain the necessity of giving wages to workers for their services, which support the existence of the contract of hire in Islamic law as prescribed in the Qur'an. Abu Hurayrah stated that the Prophet (s.a.w.) ordered the giving of wages to the worker before the worker's sweat becomes dry. In another *hadith*, the Prophet (s.a.w.) mentioned the significance of stipulating in the contract of service the amount of wages to be paid for the service rendered.<sup>47</sup>

For a contract of service to be valid, there are four essentials that must be fulfilled according to the majority of Muslim scholars: the Malikis, Syafi'is and Hanbalis. The four essentials are that there must be two parties to the contract as well as an offer and an acceptance and the wage and usufruct<sup>48</sup>. The Hanafis on the other hand consider only the hire pronouncement and the wage as the essentials of the hire contract.<sup>49</sup> Regardless of this difference, the most significant element to be discussed is the right of the employee to receive a wage for services rendered. The wage in favour of the employee is unanimously agreed upon by the four Sunni schools of law as an essential of the contract of service; without the element of a wage the contract of service does not exist.

In this regard, the entitlement to a wage arises out of the service offered by the employer. It is stated in article 424 of the *Mejelle* that the right of the common employee to pay arises as a result of the work being done. This means that once the employee resigns, he is no longer entitled to a wage. However, if it is a condition stipulated in the contract and agreed upon by both parties that there is a continuity of the entitlement to the wage after the expiration of the contract, the employee is still entitled to the wage.

It is important to note that the only absolute right of an employee that arises from his contract of service is the wage. It is submitted that other employee entitlements to payment and benefits are completely dependent upon the conditions agreed upon by both parties. The contract of service is equivalent to any other commercial contract such as a contract of sale. In this contract, there is an exchange

of things that constitute both the subject matter and the consideration of the contract.

The service rendered by the employee is the subject matter of the contract and the wage paid by the employer to the employee is the consideration. The Syariah Advisory Council of Bank Negara Malaysia issues a resolution that the usufruct or in this case the service is the subject matter of the contract and when it ceases to exist, such a contract is therefore terminated.<sup>50</sup> Therefore, the retirement benefits do not constitute part of the subject matter of the contract of employment. Similar thing applies to the contract of sale, the seller is entitled to the proceeds of the sale and the buyer is entitled to the goods delivered. Besides this, any conditions inserted in the contract for the benefit of either party and mutually agreed upon by them are lawfully binding upon them as stipulated.<sup>51</sup>

In *Haji Wan Othman & Ors v. Government of the Federation of Malaya*,<sup>52</sup> the Court stated that the right to the pension scheme does not arise from the contract of service:

*In determining this question it is in my opinion sufficient only to examine the nature of Government pensions. There is no doubt that it is in Government's interest to pay pensions because they ensure devoted service and the retention of the service of experienced and skilled officers, but pensions are not payable by Government because of a contract with its employees; they are payable by virtue of the Pensions Ordinance, 1951, and its predecessor from which it departs little if at all. The Ordinance does not say that when a public servant has worked so many years at such and such a salary he shall be entitled to receive so many pensions a month from Government.*

## **CONCLUSION**

To sum up, based on the contentions discussed above, it is submitted that the government's retirement benefits are not subject to *faraid* distribution. It is not an absolute right of the pensionable officer and hence does not constitute his estate upon his death. According to the *Syariah*, the subject matter of the contract of employment is the salary and the service is its consideration. The retirement benefits are, therefore, not part of the subject matter. This is further clarified in s. 3 of the Pension Act 1980 and s.3 of the Statutory and Local



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Authorities Pensions Act 1980 that no employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefits under such Acts. Therefore, the current practice adopted by the Government of granting such benefits to certain persons upon the death of the pensionable officer does not apparently contradict the principles of the *Syariah*. The Government is, therefore, free to determine in whose favour the benefits may be granted. The surviving wife and those dependants of the deceased are in fact the directly affected family members with the death of the pensioner. They deserve to receive it that can reduce their financial burdens especially for education. However, when deciding who the rightful recipients are the government should certainly take into account appropriate criteria such as the level of dependency of the recipients upon the dead pensionable officer.

#### ***Notes***

1. There are three Qur'anic verses, known as verses of inheritance that elucidate in detail matters of inheritance, namely chapter *al-Nisa'* (4): 11, 12 and 176. In summary, these verses explain and prescribe the entitled legal heirs, their respective portions of shares, the principle of the 2:1 ratio between male and female legal heirs and the need to settle the rights attached to the estate prior to the distribution. The *Sunnah* elaborates further the general inheritance rules, and in some cases introduces new principles that are not expressly mentioned in the Qur'an. For instance, the rule of priority in succession, the principle of the completion of 2/3 between a daughter and son's daughters, the entitlement of the maternal grandmother and the entitlement of the *bayt al-mal* or the state treasury to the estate.
2. Tanzil al-Rahman, *A Code of Muslim Personal Law* (Karachi: Islamic Publishers, 1980), vol. 2, p. 400.
3. *Ibid.*
4. [1948] PLD P.C.150c
5. *Ibid.*, p. 406.
6. Zulkifli Muda, *Hak-Hak Akibat Pertukaran Agama Dan Mazhab*, (University Kebangsaan Malaysia: unpublished Ph.D thesis, 1999), pp. 426-427.

7. *Ibid.*
8. *Ibid.*
9. Tanzil al-Rahman, 1980, p. 406.
10. Zulkifli Muda, 1999, pp. 426-427.
11. *Ibid.*
12. Abdul Aziz Jemain, Lukman Z. and Wan Norsiah Mohamed, "Kesejahteraan Hidup di Hari Tua", in Abdul Aziz Jemain (eds), *Jaminan Sosial Warga Tua* (Selangor: Prentice Hall, 2001), p. 3.
13. [http://www.jpapencen.gov.my/english/faq\\_answer.html#1](http://www.jpapencen.gov.my/english/faq_answer.html#1) [accessed on 19 December 2011].
14. *Ibid.* Appointment before or at 1/10/2001 - compulsory retirement age is 55 years. Appointment on or after 1/10/2001 - compulsory retirement age is 56 years old. Appointment on or after 1.07.2008 - compulsory retirement age is 58 years old.
15. Sarmila Md. Sum & Zaimah Ramli, "Keperluan Pencen dan Pelaburan sebagai Sumber Jaminan Kewangan di Hari Tua", in Abdul Aziz Jemain (eds), *Jaminan Sosial Warga Tua* (Selangor: Prentice Hall, 2001), p. 3.
16. [http://www.jpapencen.gov.my/english/pension\\_scheme\\_obj.html#1](http://www.jpapencen.gov.my/english/pension_scheme_obj.html#1) [accessed on 19 December 2011]
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. [http://www.jpapencen.gov.my/english/faq\\_answer.html#1](http://www.jpapencen.gov.my/english/faq_answer.html#1) (*Ibid.*)
23. *Ibid.*
24. *Ibid.*
25. Ibn Manzur, Muhammad, *Lisan al-Arab*, (Beirut: Dar al-Sadir, 1990), vol. 10, p. 4.
26. Ba'albaki, Ru%i, *Al-Mawrid, A Modern Arabic- English Dictionary*, 8th edition, (Beirut: Dar al-'Ilm li al-Malayin, 1992), p. 311.
27. *Ibid.*, p. 310.

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28. Ibn Abidin, al-Syami, *Hasyiyah Rad al-Mukhtar ala Dur al-Mukhtar*, (Pakistan: Maktabah Rasyidiyyah Ku'tah, 1404H), p. 535.
29. Al-Dusuqi, Muhammad Arifah, *\$ashiyah al-Dusuqi ala Sharh al-Kabir*, (Beirut: Dar al-Fikr, n.d.), vol. 4, p. 457.
30. Al-Syarbini, al-Khatib, *Mughni al-Muhtaj*, (Egypt: Mustafa al-Babi al-Halabi, 1958), p. 3.
31. Al-Bahuti, Ibn Yunus Ibn Idris, *Kashaf al-Qina' ala Matn al-Iqna'*, (Iskandariyyah: Mu'assasah Syabab al-Jamiah, 1981), vol. 4, p. 402.
32. Al-Mubarakfuri, Muhammad bin Abd al-Rahim, *Tuhfah al-Ahwadhi bi Sharh Jami al-Tirmizi*, (n.p. : Dar al-Fikr, 1974), vol. 6, p. 264. Shawkani states in Nayl al-Awtar that a similar *hadith* was narrated by al-Bukhari, Muslim, Ahmad from Abu Hurayrah: "Whoever leaves behind property, his *acabah* will inherit, and whoever leaves behind debts or nothing, then he is supposed to come to me, because I am his guardian." See al-Shawkani, Muhammad bin Ali bin Muhammad, *Nayl al-Awtar*, (Cairo: Matbaah Mustafa al-Halabi, 1250H), vol. 6, p. 57.
33. Ibn Majah, *Sunan Ibn Majah*, (Cairo: Matba'ah Isa al-Halabi, n.d.), vol. 2, pp. 914- 915.
34. Wahbah Al-Zuhayli, *al-Fiqh al-Islami wa Adillatuhu*, 4, (Dar al-Fikr: Damascus, 1985) vol. 4, p. 59.
35. Al-Qaradawi, Yusuf, *Fiqh al-Zakah*, (Beirut: Mu'assasah al-Risalah, 1997), vol. 1, p. 130.
36. Al-Zuhayli, vol. 4, pp. 68-77. See also Bakar, Mohd Daud, "Islamic Property Management: An Overview", *Seminar on Islamic Financial Planning*, organized by Centre For Research and Training (CERT), The Quality Hotel City Center Kuala Lumpur, Malaysia, 29th – 30th July 2002.
37. Al-Zuhayli, vol. 4, p. 61.
38. Zaydan, Abd al-Karim, *al-Madkhal li Dirasah al-Shariah al-Isa'amiyyah*, 16th edition, Beirut: Muassasah al-Risalah, 2001, p. 40.
39. Al-Syamibi, *al-Muwafaqat*, vol. 2, p. 6 & 37.
40. Al-Zuhayli, vol. 4, p. 44.
41. [1965] 2 MLJ 426.
42. The similar effect is stated in section 3(2) of the Statutory And Local Authorities Pensions Act 1980 which reads: "Where it is established to

the satisfaction of the Minister by an appropriate authority that an employee has been guilty of negligence, irregularity or misconduct, the Minister may reduce or withhold the pension, gratuity or other benefit for which such employee would be eligible but for this section.”

43. [http://www.jpapencen.gov.my/english/faq\\_answer.html#1](http://www.jpapencen.gov.my/english/faq_answer.html#1) (*Ibid.*).
44. [2002] 1 MLJ 288.
45. Nik Ahmad Kamal Nik Mahmood, *Kontrak Pekerjaan: Satu Analisa Perbandingan*, in *Jurnal Al-Ahkam*, (Dewan Bahasa Dan Pustaka: Kuala Lumpur, 2000), Jilid 7, p. 97.
46. See al-Zuhayli, p. 730.
47. *Ibid.*, pp. 730-731).
48. *Ibid.*, p. 731.
49. *Ibid.*, p. 731).
50. Bank Negara Malaysia, *Resolusi Syariah Dalam Kewangan Islam*, (Bank Negara Malaysia: Kuala Lumpur, 2010) 2nd edition, p. 7.
51. The mutual agreement of both parties to the contract is a condition necessary to make the contract valid. This is based on the Qur'anic injunction which prescribes the mutual agreement of the parties to the contract in al-Nisa' (4): 29. See al-Zuhayli, p. 736.
52. [1965] 2 MLJ 31.