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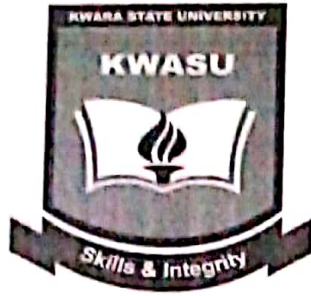
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is **dedicated** to our beloved Vice-Chancellor
Kwara State University Malete - Ilorin, Nigeria



Late Professor Mohammed
Mustapha Olarongbe Akanbi, SAN

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**ADMINISTRATION OF PENSION FUNDS UNDER NIGERIAN
NEW CONTRIBUTORY PENSION SCHEME:
A REVIEW UNDER ISLAMIC LAW**

Onikosi Ahmeed Adedeji* Adekunle A. Aminu** & Ahmed A. Muhammed-Mikaeel***

Abstract

Search for financial security after active service years of employees in Nigeria gave birth to pension scheme regimes in Nigeria. The focus point of the new pension scheme is security of funds and reasonable investment for profitability. Lots of Muslim subscribers have been complaining against the present administration regime of their pension funds. Hence, this paper examines the administration of funds under the new Contributory Pension Scheme from Islamic law perspective. The paper adopts doctrinal method of legal research. This paper revealed that Shari'ah is very much interested in what happens to Muslim in relation to the pension funds; and that the administration of pension funds in Nigeria is marred with gharar, riba and maisir and thus violates Shari'ah tenet; and that the present structure of pension scheme in Nigeria which lacks Shari'ah Advisory Board is responsible for the continuous violation of Shari'ah tenet in the administration of pension funds. This paper recommends for the amendment of the extant pension regime to pave way for Shari'ah Advisory Board to guide on administration of pension funds.

Keywords: *Pension Funds, Administration of Pension Funds, the Nigerian New Contributory Pension Scheme, Islamic Law*

1. Introduction

Generally, a discussion on the Islamic perspective on pension funds makes the topic fall inexcusably under the purview of Islamic finance. The fundamental characteristic of the Islamic finance system today is based on the Qur'an directive which bans the payment and or receipt of interest, gambling, uncertainty and the sharing of profit and loss. The philosophical basis of the Islamic finance system goes beyond the interaction of factors in production and economic behaviour.¹ While the conventional financial system focuses primarily on the economic and financial aspects of transactions, the Islamic system places equal emphasis on the ethical, moral, social, and religious dimensions. In addition, Islamic law prohibits investing in businesses that are considered unlawful. These businesses may include but not limited to businesses that sell alcohol or pork, or produce gossip columns or pornography. Due to these prohibitions, observant Muslims require specialised Shari'ah compliant alternative arrangements from financial institutions.

Pension funds, being a species of Islamic finance must conform to the standards of transaction allowed within the confines of the Shari'ah without an exception. For instance, utilisation of

*Ph.D, Department of Islamic Law, Faculty of Law, Al-Hikmah University, Ilorin. Email: aaonikosi@alhkmah.edu.ng Tel: 08069841316

**Department of Private and Business Law, Faculty of Law, Al-Hikmah University, Ilorin. Email: aaaminui@alhkmah.edu.ng Tel: 07035236789

***Department of Islamic Law, Faculty of Law, Kwara state University, Malete. Email: ahmed.muhammed-mikaeel@kwasu.edu.ng Tel: 07035064745

¹ Hussein I A, 'Principals of Islamic Finance: A Focus n Project Finance,' Munich Personal Re P Ec Archive (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=i8o6305> accessed 14 Sept 2019.

pension funds must be invested or utilised in such a way that it does not run contrary to the principles guiding usury, uncertainty or gambling. Against this backdrop, this paper examines administration of pension funds under the new Nigerian pension scheme from Islamic law perspective.

Understanding the Purports of the Pension Funds

2. The primary economic function of a pension plan is to provide retirement income security to planned beneficiaries. This is the conventional view of pensions expressed by most pension professionals.² Thus, the concern of the new pension scheme is safety of the fund and the maintenance of fair returns on the amount invested.³ The need for safety is emphasised in determining the quality of the instrument to invest in and a Pension Fund Administrator (PFA) is expected to adopt a risk management profile in making investment decisions with due regard to the credit rating of companies registered under the Investment and Securities Acts of 1999. PFA was expected to appoint risk management and investment strategy committees. The risk management committee determines the risk profile of investment portfolio and ensures adequate internal control measures and procedures. The investment strategy committee determines the portfolio mix consistent with the risk profile, evaluate and review the performance of investment on periodic basis⁴.

Against the guaranteed structure, the PFA is to invest in the any of the following as specified by Section 86:

- (a) Bonds, bills and the securities issued or guaranteed by Federal Government or the Central Bank of Nigeria
- (b) Bonds, bills and other securities issued by states and local government
- (c) Bonds, debenture, redeemable preference shares and other debt instruments issued by listed corporate entities and listed on a stock Exchange registered under the investment and Securities Act
- (d) Ordinary shares of public limited companies listed on a securities exchange registered under the investment and Securities Act
- (e) Bank deposits and securities
- (f) Investment certificates of closed-end investment fund or hybrid investment fund listed on a securities exchange registered under the investment and Securities Act
- (g) Units sold by open-end investment funds or specialist open-end investment funds registered under the investment and securities act
- (h) Real estate investment
- (i) Other investments prescribed by the pension commission.

Section 87 further provides that PFA may invest the pension funds in units of any investment outside Nigeria within the categories of investment set out in Section 86. However, the PFA shall

² Evi Bodie, 'Pension Funds and Financial Innovation,' Working Paper No. 3101 National Bureau of Economic Research 1050 Massachusetts Avenue Cambridge, MA 02138 (September 1989)

³ Pension Reform Act 2014, s. 85.

⁴ Odia, J.O and Okoye, A. E, 'Pensions Reform in Nigeria: A Comparison Between the Old and New Scheme,' (2012) 3 (1) Afro Asian Journal of Social Sciences, 2229 – 5313.

not invest pension fund or asset in shares or other securities issued⁵ by the PFA or PFC, a shareholder of PFA or PFC. Also, the Act further provides⁶ that PFA shall not sell pension fund assets to itself, any shareholder, director, affiliate, subsidiary, associate, related party or company of the PFA, any employee of the PFA, the spouse of any of the persons mentioned above, affiliates of any shareholder of the PFA or, the PFC holding pension fund asset to the order of the PFA and any related party to the PFC, utilise pension fund to purchase assets from the persons mentioned in subsection (a) of this section and apply pension fund assets under its management by way of loans and credits or as collateral for any loan taken by a holder of retirements savings account or any person whatsoever.

3. Islamic Law Perspective on Pension Funds

Pension funds are the funds pooled together through periodic and continuous contributions by the contributors, that is, employees into their respective pension accounts.⁷ The accumulation of all monies contributed by the employees within a given period of time is called pension funds. The law imposes on the custodians of the funds to manage them judiciously on behalf of the contributors.⁸ This includes investing with the funds while profits made after a particular business adventure are distributed to the employees on pro rata. It is noted that the essence of pooling the funds is to cater for the individual employees when they retire from active service. The position of Islamic law on pension fund is sanctioned under the need to work towards attainment of objective of Shari'ah in terms of protection of life and property.⁹ Shari'ah abhors wasteful spending and advocates judicious savings and prudent spending.

The idea of subjecting pension funds to investment enjoys nod under Islamic law. Islamic law sanctions responsible investments and businesses but forbids *riba* (usury). Shari'ah ordains that in the event of investment with pension funds, Islamic principles of investment must be observed. Hence, prohibited elements such as *riba*, *gharar*, *maisir* etc are to be avoided completely. The pension administrators are perceived as the trustees under Shari'ah and should observe all the requisite rules of Amana (Trust) within the tenet of Shari'ah.¹⁰ It is thus expected that funds which are considered as the wealth of the contributors should be given to them on the due date without any delay. This is deducible from the admonition of the Prophet (PBUH) that payment of wages to labourers should be done before their sweat dry off. Islamic law perceives pension fund as wealth that must be seriously guarded from being tainted with forbidden elements. Thus, pension funds of Muslims must be free from unlawful utilization or investments as laid down in the Qur'an and Sunnah.

4. The Nigerian New Contributory Pension Scheme and Islamic Law Perspective

⁵Pension Reform Act 2014, s. 88.

⁶ Ibid, s. 89.

⁷ Ibid, s. 3.

⁸ Ibid, Ss. 85-88.

⁹Bakae M U, Abdul Rahim A K, 'Maqasid Al-Shariah Theory: A Comparative Analysis between the Thoughts of Al-Shatibi and 'Izz Al-Din ibn 'Abd Al-Salam'(2021) 11 (8) *International journal of Academic Research in Business & Social Sciences*, 108-193.

¹⁰Hamat M D, et al, 'Concept of Amanah (Trustworthiness) and Al-Mas'uliyah (Responsibility) for Human's Character from Ethical Islamic Perspective' (2019) 22 (1) *Journal of Legal, Ethical and Regulatory Issues*, 12.

In the quest to cater for the life after service years of Nigerian workers both in the private and public sector, the Nigerian government, through the instrumentality of law came up with the idea of Contributory Pension Scheme.¹¹ The scheme is implemented during the active service of the employees preparatory for a sustainable after service period.¹² This paper examines the scheme from Islamic law perspective as designed and practised in Nigeria. Before looking at the scheme from Islamic law perspective, it is expedient to briefly examine the new Nigerian contributory pension scheme. The new scheme is governed by the Pension Reform Act of 2014 which replaced the erstwhile Pension Reform Act, 2004. The objective of the new scheme remains strong and passionate consciousness of the life after active service years by the employees and the need to have a sustainable after service years for them.¹³ Thus, the Pension Reform Act, 2014 is applicable to both the private and public sector.

Within the context of the Contributory Pension Scheme, pension is conceptualised as the monthly contribution in form of savings by both the employees and employers into a pension account held by employee which is accessible at a later period. The idea behind the so-called pension scheme is to inculcate the spirit of savings for the future i.e. till maturity or retirement age.¹⁴ As far as the pension Reform Act, 2014 is concerned, there is no uniformity in the retirement age. The reason being that, special category of workers enjoys longer years in service.

A case in point is that of university professors who retire at the age of 70 years while other workers are not professors retire at the age of 65.¹⁵ It is important to note that the new Nigerian Contributory Pension Scheme imposes mandatory participations on employees at the public sector with the exception of the military men and security agencies. The participation in the scheme is mandatory such that the law prescribes institution of criminal proceedings with grave consequences against any defaulting employers who failed to maintain periodic/monthly remittance.

In the same vein, the law empowers the pension administrators to properly manage the pool of funds realised from the various and recurrent contributions by the employees and employers. Management of the funds includes investing them in profitable ventures that yield certain returns on investment in favour of the contributors. To guide against mismanagement of the pension funds, the law prescribes ten (10) years imprisonment for any pension administrator who is guilty of funds' mismanagement.¹⁶ The stakeholders and the participants in the contributory scheme inevitably include Muslims while the new Nigerian Contributory Pension Scheme vide Pension Reform Act, 2014 was designed outside the contemplation of the Islamic law perspective. Hence, it is imperative to examine the Islamic law view on the new contributory pension scheme.

Islamic law is a divine law governed by the precepts laid down in the primary sources of Shari'ah. However, the notion of pension scheme is not alien to Islamic jurisprudence. It was a

¹¹ See Pension Reform Act, 2014

¹² Ibid

¹³ Pension Reform Act, 2014, s. 1.

¹⁴ Ibid

¹⁵ Salifu, I. Odame, E.D. Abubakar, J.U. 'University Teachers Decisions on Post-retirement Employment: Do Demographic Variables Count?' (2021) 7 *Gerontology & Geriatric Medicine*, 1-10.

¹⁶ Pension Reform Act, 2014, Ss. 90-103.

popular scheme adopted to support the poor, needy, aged and disabled Muslims since the time of the predecessors.¹⁷ This was actualised through the instrumentality of *Baytul Mal*, *Waqf* and other Islamic social schemes. The earliest Muslims were key into the practice of pension scheme because it sought to achieve the *Maqasaid Shari'ah*, which specifically centers on protection of life and wealth. Islamic law usually screens sources of wealth, income earnings and accumulated wealth by Muslims. Importantly, it gives zero-tolerance to *riba* of any guise and disapproves business ventures with forbidden contents.¹⁸

However, the new Nigerian Contributory Pension Scheme empowers the various pension administrators to properly manage the pension funds, including investments in profitable ventures to yield returns on investment usually credited to the various account held by the contributing employees.¹⁹ This is where Islamic law issue comes to play. Within the context of the new Contributory Pension Scheme, the pension administrators usually utilise the pension funds in *riba*-based transaction and other forbidden business outlet under the guise of investment against the Islamic principle of profit and loss sharing. The Muslim contributors are not aware of the quantum of profits made by their pension administrators let alone querying the amounts credited to their respective pension accounts. All they see in their savings is an increment in their accounts in forms of profits or returns on investments.²⁰

The foregoing practice violates Islamic law principles of responsible investment and zero-tolerance for *riba*-based transactions.²¹ In the same vein, the Islamic principles of transparency, accountability, fair dealings, disclosure and justice are violated by the way and manner the funds are being managed by the various pension administrators the reason for the foregoing is not far-fetched.²² It is because the existing framework for the new Nigerian contributory pension scheme is not Shari'ah compliant.

5. Nigerian Administration of Pension Funds and Islamic Law Issues

Understanding the basic Shari'ah principles and parameters in structuring financial products and services in Islamic financial institutions either in Islamic insurance, Islamic banking, Islamic capital markets, Islamic pawnshops, Islamic cooperative or other institutions offering Islamic financial services is very demanding for product development particularly *ribā* (usury), *gharar* (ambiguity) and *maisir* (gambling)²³. In Islam, the transaction in trade and commerce must conform to the requirement of Shari'ah which means the abstinence from prohibitions (prohibited matters) and observing that every contract possesses all its essential elements and that every essential element meets its necessary conditions.²⁴ This sections examines the basic

¹⁷ Umar, B. 'Potentials of an Islamic Pension Fund Administration Scheme in Nigeria'(2021) 2 (6) *Journal of Global Economics and Business*, 89-102.

¹⁸ Ibid

¹⁹ Pension Reform Act, 2014, Ss. 85-88.

²⁰ Ibid

²¹ Ismail Al Faruqi & Gammal Al Banna, 'Towards Islamic Labour & Unionism: Three Papers 68 (1984)'; Hauwa Ibrahim, *Practicing Sharia Law: Seven Strategies for Achieving Justice in Shariah Courts* 203 (2012) (discussing the importance of the concept of justice in Islam).

²² Ibid

²³ Muhammad Iman Sastra Mihajat 'Contemporary Practice of Ribā, Gharar and Maysir in Islamic Banking and Finance, (2016) 2 (2) *International Journal of Islamic Management and Business*.

²⁴ Ibid.

Shari'ah principles in structuring the product in Islamic financial services particularly pension funds from fiqh point of view particularly basic general prohibition in commercial transactions such as *riba* (usury or interest), *gharar* (uncertain or unclear elements in business contracts) and *maysir* (transactions similar to gambling), and the contracts banned by Shari'ah. Therefore, the section first highlights the meaning of *riba* and how they may occur in the administration of pension funds and services. Second, examines proper understanding of *Gharar*, types of *Gharar*, and how they may involve in pension funds and finance transaction. Third elucidates the concept of *Maysir*, and how it relates to pension funds.

5.1 *Gharar*

Gharar is the second important element in transaction with the aim to avoid deception and to protect the right of contracting parties, minimise disputes and to reduce the opportunity of exploitation one counterparty by another in transactions, so that no one or both parties cheated or aggrieved. *Gharar* literally means: danger or exposure to destruction, risk or hazard or risk taking, deception, delusiveness, peril, hazard, fallaciousness, undisclosed, and uncertainty. In financial application, *gharar* means deceptive uncertainty which indicating the one who practice *gharar* deceives or frauds through the use of uncertainty. It has also been described as uncertainty or risks caused by a lack of clarity regarding the subject matter or the price in a contract or exchange. A sale or any other business contract which entails an element of *Gharar* is prohibited.²⁵ An example in the context of Islamic finance is to advise a customer to buy shares in a company that is the subject of a takeover bid on the grounds that the share price is likely to increase.

Ibn Taymiyyah²⁶ characterizes *gharar* as follows:

*In a gharar sale, one party obtains something, while the other is under risk, which leads to regret of one of them, and their dispute. [...] It is well known that Allah and his Messenger did not prohibit every kind of risk. Nor all kinds of transactions that involve the possibility of gain or loss or neutrality are prohibited. What is prohibited among such kinds is eating wealth for nothing, even if there were no risk, not that risk as such is prohibited.*²⁷

Ibn Taymiyyah's student, Ibn al-Qayyim²⁸ stated:

Gharar is the possibility of existence and non-existence. Its sale is forbidden because it is a sort of gambling, which is maysir [games of chance]. Allah forbade it because of eating other's wealth for nothing, and this is injustice that Allah has forbidden. It becomes gambling when one party gets a reward (benefit) while the other might not get it, so this becomes illegal, like the sale of runaway slave [...] It is sold for less than its price. If it is found, the seller regrets, if not, the buyer regrets.

Thus, *gharar* occurs when one party to a contract acquires a benefit from the other party without payment, or not paying the true counter value for such benefit, resulting in the party not

²⁵ Nima Mersadi Tabari, 'Islamic finance and the modern world: The Legal Principles Governing Islamic Finance in International Trade', (2010) 31 (8) *The Company Lawyer*, 249-254.

²⁶ 1263-1328, full name, Taqi ad-Din Abu l-Abbas Ahmad ibn Abd al-Halim ibn Abd as-Salam Ibn Taymiyyah al-Harrani, renowned scholar of the Hanbali School of law

²⁷ Sami al-Suwailam, 'Towards an Objective Measure of Gharar in Exchange', (2000) 7 (1 & 2) *Islamic Economic Studies*.

²⁸ 1292-1350, full name Ibn al-Qayyim al-Jawziyyah, scholar of the Hanbali School.

obtaining the true counter value and regretting the transaction. Such a situation can result in riba al-fadl (excessive benefit/gain) due to the inequity of the sale.²⁹ Ibn Taymiyyah illustrated that the effective cause (illah) of gharar is uncertainty when he stated:

*... There must be another effective cause for the prohibition of sale of those articles, which are non-existent and this effective cause is gharar [uncertainty]. Consequently, only the state of non-existence that leads to uncertainty is prohibited from the sale on the ground of uncertainty, but not on the ground of non-existence [...] for instance, if one sells the future offspring of a particular animal...*³⁰

Generally, Gharar can be divided in two categories

First: Tolerable Gharar: The Tolerable Gharar (Gharar yasir, minor gharar) is Gharar that can be tolerated and acceptable by both parties, and would not affect the essence of the contract. For example, buy a specified car from dealer which will delivered by next week with agreed price for 100 million. Although the car does not exist today (uncertainty in existence), the dealer however will ensure that the car will deliver to A at the time agreed. Muslims jurists agreed that the minor gharar (gharar yasir) is tolerated and permissible.³¹

Second: Prohibited Gharar: The prohibited gharar (gharar fahish, major or excessive gharar) is an uncertainty which is so high and overwhelms a contract³². It may arise when one the buyer or the seller is not capable of taking responsibility due to lack of majority age from legal and Shar'iah aspect, the buyer or seller is coerced, the object not exist, not free from encumbrances, not specified or not according to specification, or the price not stated in the agreement and two price in one transaction. It is emphasized by Ibn Rushd³³ the major gharar originates from the ignorance and lack of information over the nature and attributes of an object, a doubt over its availability and existence, doubt over its quantity and quality, or exact information concerning the price, the unit of the currency in which the price is paid, and the terms of payment. It also related to the time of payment and deliverability of the object.³⁴

²⁹ Sami al-Suwailem, to ensure equity of a transaction, each party should have a detailed knowledge of the subject matter, thereby removing the inclusion of uncertainty (gharar) in the contract which results in illicit gain (riba al-fadl or riba of excess); Averroes, or Ibn Rushd (d. 1198), a great Malik! jurist who stated the cause of an illicit sale has four grounds: riba, gharar and terms that conduce one or two or a combination of the last two. F.E. Vogel and S.L. Hayes, III, *Islamic Law and Finance, Religion, Risk and Return*, Arab & Islamic Laws Series (Leiden: Brill, 1998) pp. 68,78

³⁰ Ibid, to ensure equity of a transaction, each party should have a detailed knowledge of the subject matter, thereby removing the inclusion of uncertainty (gharar) in the contract which results in illicit gain (riba al-fadl or riba of excess); Averroes, or Ibn Rushd (d. 1198), a great Malik! jurist who stated the cause of an illicit sale has four grounds: riba, gharar and terms that conduce one or two or a combination of the last two. F.E. Vogel and S.L. Hayes, III, *Islamic Law and Finance, Religion, Risk and Return*, Arab & Islamic Laws Series (Leiden: Brill, 1998) pp. 68,78

³¹ Kamali M H, 'Uncertainty and Risk Taking (Gharar) in Islamic Law,' paper presented at The International Conference on Takaful Insurance, Hilton Hotel, Kuala Lumpur, Malaysia, June 2 1999. ; (1999) 7 (2) *IJUM Law Journal*, 1-21.

³² Ahmad, Taris et al, *Islamic Banking and Finance: What It Is and What It Should Be*, (UK, 1st Ethical Charitable Trust, 2010), 5.

³³ Ibn Rushd, Abu Walid Muhammad ibn Ahmad. (1401/1981). "*Bi'dayat al Mujtahid wa Nihayat al Muqtasid*", Vol.

2. Beirut: Dar al-Kutub Al-Ilmiyyah.

³⁴ Ibid.

Ibn Taymiyyah³⁵ believes that the wisdom behind the prohibition of *gharar* sale or any contract which contains the elements of uncertainty and hazard in which the sale will result in taking someone else's property for vanities and injustice which is kind of immorality and hostility. A contemporary example of *gharar* is conventional insurance. Conventional insurance does carry excessive *gharar*. It is because the subject matters exchanged in the contract are between money and money which is a kind of a buying and selling contract thus making the contract exposed to conditions or requirements of reasonable knowledge in the subject matters' quantum as well as the ability to deliver them. Thus necessitate a definite fixation of the subject matters and this is not true for an insurance contract. Any breach of one of the conditions constitutes an uncertainty in the subject matters either the premium or the compensation. And consequently, these uncertainties will lead to the uncertainty of the execution of the contract itself. It also involves uncertainties arising due to uncertainty of the happening of the insured event as well as the time of happening? Although the event or the time is beyond man's control, any contract attached with these conditions is not allowed due to want of knowledge. Want of knowledge itself shall result in the existence of *gharar* in the contract.³⁶

5.2 Maisir

Maisir in the Arabic word from the word *al-yasar* (easy) literally means easily available wealth or game of chance³⁷ or refers to acquisition of wealth by chance whether or not it deprived the other people's right and cause harm to others,³⁸ or obtaining something easily without any hard work or receive benefits without working. According to *al-Masri*³⁹ Maisir and *qimar* has the same meaning, it is a game of chance with a combative relationship between two contracting parties, each of whom undertakes the risk of loss, and the loss of one means gain for the other. In other word, if a person puts some of his money or a part of his wealth at stake wherein the amount of money at risk might bring huge sums of money or might not bring any. In the common practice, Maisir is used to refer to as a gambling. Another term used in the Qur'an is the word of '*azlam*' means gambling practices.⁴⁰

The term Gambling in Islamic finance is defined as any transaction conducted by the two parties to possess the ownership of a particular asset or service which causes benefit to one party and harm to others by linking a particular transaction with an act or event." Ibn al-Arabi defines maisir or *qimar* as a game where each contestant seeks to defeat his partner in order to take over the property that provided for the winner. In prohibiting gambling, Qur'an provides thus: '*O you who believe, intoxicants, and gambling, and the altars of idols, and the games of chance are abominations of the devil; you shall avoid them, that you may succeed.*'⁴¹

³⁵Kamali, M H, *Fiqhi Issues in Commodity Futures in "Financial Engineering and Islamic Contracts*, (New York, Palgrave, 2005), 20-57.

³⁶Ahmad W M, '*Some Issues of Gharar (Uncertainty) in Insurance*,' (2002) 10 (2) *Jurnal Syariah*.

³⁷Al-Qurthubī, Abi, '*Abd Allah Muhammad Ibn Ahmad al-Anshārī. Al-Jāmi' Li Ahkām Al-Qur'ān*,' Dār al-Hadith, Vol. 2, (Cairo, 2010).

³⁸Ibid

³⁹Al-Misri, Rafiq Yunus. "*Al-Maysir wa al-Qimar al-Musābaqaāt wa al-Jawāiz*", Damascus. (1993).

⁴⁰Kamali, (n. 35), 20-57.

⁴¹Qur'an 5:90.

Similarly, the Qur'an also states: 'The devil wants to provoke animosity and hatred among you through intoxicants and gambling, and to distract you from remembering God, and from observing the Contact Prayers (Salat). Will you then refrain?'⁴²

In relation to the sale of goods, hadith have been variously interpreted to refer both to maisir and to gharar because they forbid the sale of "the stroke of the diver" (i.e. anything a diver may return with after a dive), of unexamined goods a buyer touches (a game played by merchants in Mohammed's time), and of the sale of goods determined by the throwing of a rock (another game).⁴³ One of such hadith is

Do not buy fish in the sea, for it is gharar. The Prophet forbade sale of what is in the wombs, sale of the contents of the udders, sale of a slave when he is runaway ... The Messenger of God forbade the [sale of] the copulation of the stallion ... He who purchases food shall not sell it until he [measures] it.⁴⁴

The similarities between gambling and these pre-Islamic game-sales are clear; the buyer will be forced to purchase, and the seller forced to sell, something of an unknown value.⁴⁵

5.3 Ribah

The literal meaning of ribā is increase, addition, expansion, or growth. Allah (swt) said: "But when we pour down rain on it, it is stirred to life, and it swells (*rabat*)."⁴⁶ Thus, the growth that comes forth from the ground is labeled as ribā. He (SWT) also said: "Lest one party would be more numerous (*'arba*) than the other."⁴⁷ Thus, an increase in number, amount, etc., is considered "ribā" in the lexical sense of the word.⁴⁸ In the context of Islamic finance, it means an addition, however slight, over and above the principle of a loan or debt.⁴⁹ Hence ribā includes both usury and interest as used in modern commercial terminology.⁵⁰ Imam Sarakhsi, Al-Shirbīnī and „Imārah define ribā as an excess from initial capital that required in a business transaction without any equivalent counter value that justified by shari'ah. The additional sense in the context of ribā is the extra money earned from the capital in a way that is not justified by shari'ah, whether it is small or big amount as indicated in the Qur'an.⁵¹ Attia⁵² views ribā is one of the most significant financial prohibitions under the Shariah. The rationale for the prohibition

⁴² Qur'an 5:91.

⁴³ Nicholas C. Dau-Schmidt, 'Forward Contracts—Prohibitions on Risk and Speculation Under Islamic Law,' (2012) 19 (2) Indiana Journal of Global Legal Studies, 533-553.

⁴⁴ See Frank E. Vogel & Samuel . Hayes, 'Islamic Law and Finance: Religion Risk and Return,' (these hadiths on gharar, which means "risk" or "uncertainty" in Arabic, are attributed to Ibn Hanbal, Ibn Maja, Bukhari, and Muslim). (1998), 88.

⁴⁵ Ibid

⁴⁶ Q22:5

⁴⁷ Q16:92

⁴⁸ Al-Zuhaili, 'Financial Transactions in Islamic Jurisprudence'. (M. A. El-Gamal, Trans.) Damascus: Dar Al-Fikr. (2001).

⁴⁹ Reyadh Mohamed Seyadi, 'Legal Aspect of Islamic Finance,' (2015) 29 (3) Arab Law Quarterly, 285-295.

⁵⁰ Muhammed S A, *Understanding Islamic Finance* (London, John Wiley & Sons, 2008), 58.

⁵¹ Muhammad Iman Sastra Mihajati, 'Contemporary Practice Of Ribā, Gharar And Maysir In Islamic Banking And Finance,' (2016) 2 (2) IIUM International Journal of Islamic Management and Business,.

⁵² Ibid.

if riba can be traced to a qur'anic verse which provides thus: 'O Believers! Do not consume riba, doubling and redoubling, and fear God so that you may prosper.'⁵³

Drawing upon Tabari, Abdullah Saeed enunciates: Explaining the meaning of the term used in verse 3:130, Tabari (d.310 AH), the well known commentator on the Qur'an, says:

Do not consume riba after having professed Islam as you have been consuming it before Islam. The way pre-Islamic² Arabs used to consume riba was that one of them would have a debt repayable on a specific date. When that date came the creditor would demand repayment from the debtor. The latter would say, 'Defer the repayment of my debt; I will add to your wealth.' This is the riba which was doubled and redoubled.⁵⁴

Ribā is forbidden in the Qur'an, the tradition of the Prophet (pbuh) (Sunnah), and consensus (ijma). In the Qur'an, the strongest prohibition is provided in the verses [2:275- 279]:

Those who devour usury (ribā) will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: 'trade is like ribā', but Allah Lord desist shall be pardoned for the past; their case is for God (to judge); but those who repeat (the offense) are companions of the fire. They will abide therein (forever). God will deprive usury of all blessing, and He will give increase for deeds of charity. For He loves not creatures ungrateful and wicked. O ye who believe! Fear God, and give up ribā], take notice of a war from God and His Apostle; but if ye turn back ye shall have your capital sums, without increase or diminution.

There are many proofs of the prohibition of ribā in the Sunnah of the Prophet (PBUH). Among them is from who reported as follows:

The Prophet (pbuh) said, "Avoid the seven great destructive sins." They (the people!) asked, "O Allah's Apostle! What are they?" He said, "To join partners in worship with Allah; to practice sorcery; to kill the life which Allah has forbidden except for a just cause (according to Islamic law); to eat up usury (Ribā), to eat up the property of an orphan; to give one's back to the enemy and fleeing from the battle-field at the time of fighting and to accuse chaste women who never even think of anything touching chastity and are good believers. (Bukhari & Nasai)

Jabir reported: 'Allah's Messenger (pbuh) cursed the accepter of interest and its payer, and one who records it, and the two witnesses, and he said: They are all equal. (Muslim). From Ibn Masud, the Prophet said: 'There are seventy three different types of ribā, the least of which is equivalent to bedding one's mother, and the worst of which is equivalent to destroying the honor of a Muslim. (Al-Hakim).'

From Abu Sa'id al-Khudri: 'The Prophet said: "Do not sell gold for gold except when it is like for like, and do not increase one over the other; do not sell silver for silver except when it is like

⁵³ Qur'an 3 verse 130.

⁵⁴ Tabari quoted in A. Saeed, "Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation" (New York, 1996), 22. Hereinafter A. Saeed. 4 Ibn Hajar quoted in A. Saeed, 22.

for like, and do not increase one over the other; and do not sell what is away [from among these] for what is ready. (Bukhari and Muslim).'

Any Islamic contract can be rendered as *ribā* if it loses its substantial element. Some examples include, a Mudarabah contract, whereby the Mudarib or the financial manager guarantees the capital invested by the Rabb-al-Maal. Likewise, in a Musharakah contract, whereby one partner guarantees the capital of another partner, the partnership contract becomes void and *Ribā* is constituted. Since the substance for both of those contracts is profit and risk sharing, rather than risk shifting.

There exists a controversy amongst scholars as to the divisions of *riba* with some classifying same into two, that is, *ribā al-nasiah* and *ribā al-fadhl*⁵⁵ while some classify same into three with the addition of *ribā al-yad*. *Ribā al-Nasiah* (*riba* in credit) occurs when there is delay in the settlement or payment for one or both counter values as the interest charged on loans in conventional bank.⁵⁷ *Ribā al-Fadh* (*riba* in surplus) occurs when a sale with a surplus or excess charged in the exchange of a specific commodity in barter transactions for example changing a latest model of gold of 100 gram with an old model of 110 gram.⁵⁸ *Ribā al-yad*. Is sale with deferment on both price and subject matter or one of them.⁵⁹

5.4 Lack of Pension Shari'ah Advisory Board

Over the years, the management of pension scheme in Nigeria has been inundated by multiple and diverse problems such as inadequate funding, inadequate subventions and grants, poor documentation and filing in pension offices, direct release of pension funds to underwriters, accumulated arrears of pensioners, inability to determine appropriate investment portfolios, lack of accountability, corruption and embezzlement of funds. Others include cumbersome clearance procedures, incompetence and inexperience of pension staff added to poor human relations, lack of etiquette and simple courtesy. However, from the Islamic oriented perspective, it would be imperative to include as one of the challenges to the administration of pension scheme in Nigeria is the lack of Shari'ah Pension Advisory Board. A Shari'ah board is an independent body entrusted with directing, reviewing, and supervising the activities of Islamic financial institutions for the purpose of Shari'ah compliance⁶⁰. Shari'ah governance is considered a unique kind of governance in financial architecture, as it is concerned with the religious aspects of the overall activities of Islamic financial institutions as compared to the conventional concept of corporate governance. The institution of Shari'ah board is one of the most important components of

⁵⁵ Ibn al-Qayyim al-Jawziyyah, Muhammad ibn Abī Bakr. *‘I‘lām al-Muwaqī‘īn ‘an Rab al-‘Ālamīn’*, Vol. 3. Cairo: Maktabah Ibn Taimiyyah, (1999).

⁵⁶ Al-Shirbīnī, Syamsuddīn Muhammad ibn Muhammad al-Khatīb. *‘Mughni alMuhtāj ilā Ma‘rifati Ma‘ānī Alfīzi al-Minhāj’*, Cairo: Dār al-Hadith, Vol. 2. (2006).

⁵⁷ Chpara, Umer, *‘Islamic Banking and Finance: Fundamental and Contemporary Issues, chapter of the Case against Riba: Is It Compelling?’* Saudi Arabia: IRTI-IDB, (2004), 25-50.

⁵⁸ Al-Shirbīnī, Syamsuddīn Muhammad ibn Muhammad al-Khatīb. *‘Mughni alMuhtāj ilā Ma‘rifati Ma‘ānī Alfīzi al-Minhāj’*, (n. 56).

⁵⁹ Muhammad Iman Sastra Mihajat, (n. 51).

⁶⁰ Bashar H. Malkawi *‘Shari'ah Board in the Governance Structure of Islamic Financial Institutions Source: The American Journal of Comparative Law, (2013) 61 (3) Published by: Oxford University Press Stable, 539-577* <https://www.jstor.org/stable/43668167/> accessed: 15 Sept 2019.

corporate governance of Islamic financial institutions. The Shari'ah board has profound influence on the day-to-day practice of finance in providing advisory and consultative services.

The board is expected to be an independent body of experts knowledgeable in fiqh al-muamalat and entrusted with the duty of directing, reviewing and supervising the activities of the Commission, to insure Shari'ah compliance. The Shari'ah board reviews transactions and actions of Commission to ensure their adherence to Islamic law. It is the responsibility of the Shari'ah board to work with management to ensure that everything relating to the financial product or service is in compliance with the principles and precepts of the Shari'ah and, equally as important, to ensure that there is sufficient transparency in the Shari'ah process so that the product or service is understood by consumers or investors to be Shari'ah compliant.

The Pension Reform Act established a body called National Pension Commission to serve as the major regulatory organ to regulate all the pension system in the country⁶¹. The scheme provides that the National Pension Commission (PenCom) shall regulate, supervise and ensure the effective administration of pension matters in Nigeria⁶². Section 24 of PRA 2004 states that the powers of the Commission shall be to formulate, direct and oversee the overall policy on pension matters in Nigeria⁶³; fix the terms and conditions of service including remuneration of the employees of the Commission⁶⁴; request or call for information from any employer or pension administrator or custodian or any person or institution on matters relating to retirement benefit⁶⁵; charge and collect such fees, levies or penalties, as may be specified by the Commission⁶⁶; establish and acquire offices and other premises for the use of the Commission in such locations as it may deem necessary for the proper performance of its functions under this Act; establish standards, rules and regulations for the management of pension funds under this Act;⁶⁷ investigate any pension fund administrator, custodian or other party involved in the management of pension funds⁶⁸; Impose administrative sanctions or fines on erring employers or pension fund administrators or custodians;⁶⁹ Order the transfer of management or custody of all pension funds or assets being managed by a pension fund administrator or held by a custodian whose license has been revoked under this Act or subject to insolvency proceedings to another pension fund administration or custodian, as the case may be⁷⁰; move pension funds and assets from one PFA or PFC to another when the Commission believes that funds and assets are endangered⁷¹; appoint management committee in the resolution of failing pension operators;⁷² accredit any person, body corporate or institution that engages in any activity relating to pension matters in Nigeria pursuant to this act;⁷³ request the Accountant-General of the Federation to credit into the Federal Government Retirement Fund Account, Federal Government's obligation for the redemption of

⁶¹ Pension Reform Act 2014, s. 17.

⁶² Ibid, s. 18.

⁶³ Ibid, s.24 (a).

⁶⁴ Ibid, s. 24 (b).

⁶⁵ Ibid, s. 24 (c).

⁶⁶ Ibid, s. 24 (d).

⁶⁷ Ibid, s. 24 (e).

⁶⁸ Ibid, s. 24 (f).

⁶⁹ Ibid, s. 24 (g).

⁷⁰ Ibid, s. 24 (h).

⁷¹ Ibid, s. 24 (i).

⁷² Ibid, s. 24 (j).

⁷³ Ibid, s. 24 (k).

the retirement benefits bonds issued to its employees for their past service⁷⁴; set up technical committees, working group and task force to assist the commission in the performance of its duties and functions under the Act⁷⁵; make changes to its structure with the approval of the board⁷⁶; And do such other things in its opinion are necessary to ensure the efficient performance of the functions of the Commission under this Act⁷⁷.

Parts VII of the PRA 2014 - Management and Staff of the Commission shall include a Director-General who shall be appointed by the president subject to ratification by the Senate⁷⁸. Also, the Commission shall have a Secretary and a Legal Adviser⁷⁹.

A critical look at the provisions⁸⁰ of the Act as it relates to the establishment of the Commission, powers and Officers, shows glaring apathy towards adequate provision for the establishment of a Shari'ah Advisory Board to advice the Commission on the provisions of the Shari'ah as it relates to pension funds and its administration. The absence of Shari'ah Advisory Board may have a dire effect in the protection of Muslim pensioners. Due to significant growth of the number of Muslim pensioners and the fact that a measurable number of the country's population are Muslims, there is the dire need for a Shari'ah advisory board as it relates to pension activities. In particular, effective Shari'ah governance is crucial to strengthen the credibility of the Islamic financial system and ultimately protect the interest of Muslim pensioners as a whole. Failure to provide efficient Shari'ah governance would inevitably lead to serious disruptions in provision of the Shari'ah as it relates to the accumulation and use of wealth acquired.

6. Conclusion and Recommendations

New Contributory Pension Scheme has brought to the fore a number of improvements on the previous regimes. This becomes apparent in the aspect of ensuring safety of the funds and off course investment in profitable ventures as well as measures put in place to guide against abuse. However, administration of the pension funds gives one serious concern especially from Shari'ah compliance angle. The reason being that, the present framework for the new pension scheme offends a number of Islamic principles of responsible investment. The paper finds that Shari'ah dictates every aspect of Muslims including their funds' spending and saving habit amidst the kind of investment their funds are subjected to. The study finds that in the administration of pension funds under the new pension scheme, Shari'ah issues of *riba*, *maisir*, *gharar* were not paid adequate attention to. This is owing to the fact that the new scheme does not make provision for Shari'ah Advisory Board in the administration. It is hereby recommended that the new pension scheme should be amended to make way for utilization of Shari'ah Advisory Board to avoid further violation of Shari'ah principles in the administration of pension funds. Islamic finance industry should also be utilized with a view to investing pension funds in Shari'ah compliant ventures.

⁷⁴ Ibid, s. 24 (l).

⁷⁵ Ibid, s. 24 (m).

⁷⁶ Ibid, s. 24(n).

⁷⁷ Ibid, s. 24(o).

⁷⁸ Ibid, s. 26(1).

⁷⁹ Ibid, s. 27(1).

⁸⁰ Ibid, ss 17- 31.